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# **Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families**

*Barbara J. Cox\*\**

Alternative families<sup>1</sup> have achieved some limited success in obtaining recognition for their families and obtaining benefits normally provided to traditional nuclear families. The impetus for this movement to expand the provision of recognition and benefits from traditional nuclear families to alternative families has been a recognition that the nuclear family, once considered the traditional paradigm for the definition of family in our society, has decreased in prevalence significantly in the past thirty years.<sup>2</sup> Because of this decrease in the number of traditional nuclear families and the concurrent increase in the number of alternative families,<sup>3</sup> a campaign has been in existence for the past sev-

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\* This banner flew from the stage at the 1987 Gay and Lesbian March on Washington. K. Weston, *Families We Choose: Lesbians, Gays, Kinship* 107 (1991).

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<sup>1</sup> The term "alternative family" as used in this article means:

Two or more adults, not related by blood, marriage or adoption, who are involved in a mutually supportive, committed relationship . . . together with their dependent children.

Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 *Wis. Women's L.J.* 1, 3 n.8 (1986).

<sup>2</sup> Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 *Harv. L. Rev.* 1640, 1640 n.1 (1991)[hereinafter *Family Resemblance*] which indicates that the proportion of families consisting of a married couple and their minor children has declined from 44.2% in 1960 to 27.0% in 1988. Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Special Studies Series P-23*, No. 163, *Changes in American Family Life* 10 (1989)(fig. 8).

<sup>3</sup> *Family Resemblance*, supra note 2, at 1640 nn.2-4. For example, in 1988, single parents living with their minor children had doubled from 1970 to 1988 to 27.3% of households. Children living with a stepparent had increased by 11.6%. Unmarried couple households

eral years by members of alternative families pursuing recognition through legislation, litigation, and collective bargaining.<sup>4</sup> This campaign has focused on obtaining recognition and benefits for the alternative family. Numerous cities and employers have begun to recognize these families and provide them with some of the same benefits that traditional families receive.<sup>5</sup>

This movement to achieve recognition and benefits has proceeded primarily with a focus on recognizing the adult partners in the family. In fact, many of the plans are referred to as domestic partnership plans.<sup>6</sup> What has been slow in coming, in fact virtually non-existent, is recognition of the parental bonds that are being entered into within these families. This is true despite the ever-increasing number of children living in alternative families.<sup>7</sup>

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consisting of two unrelated adults of the opposite sex with or without children increased from 523,000 to 2,764,000 in 1989. The number of gay men and lesbians living together, while not officially counted by census figures, have increased also. *Id.*

<sup>4</sup> Cox, *supra* note 1, at 4-5. See also, Berger, *Domestic Partner Initiatives*, 40 DePaul L. Rev. 417 (1991).

<sup>5</sup> National Center for Lesbian Rights Newsletter 3 (Spring/Summer 1991). Among the private sector "domestic partnership" plans in effect are the following: the American Civil Liberties Union/Northern California; American Friends Service Committee/Philadelphia, PA; American Psychological Association/Washington D.C.; Ben & Jerry's Homemade/Waterbury, VT; Columbia University/New York, NY; Committee of Interns & Residents Staff Union/New York, NY; Consumers United Insurance Company/Washington, D.C.; Greenpeace/Washington D.C.; Human Rights Campaign Fund/Washington, D.C.; Lambda Legal Defense & Education Fund/New York, NY; Montefiore Medical Center/New York, NY; Mt. Sinai Hospital Nurses/New York, NY; Museum of Modern Art/New York, NY; National Center for Lesbian Rights/San Francisco, CA; National Organization for Women/Washington, D.C.; New York-New Jersey Telephone Company workers/New York, NY; New York University/New York, NY; Oil Chemical & Atomic Workers/New York; Seattle Mental Health Institute/Seattle, WA; Stanford University/Palo Alto, CA; University Students Cooperative Association/Berkeley, CA; Village Voice Newspaper/New York, NY. Lotus Corporation has just announced that it will provide benefits to all its employees living in alternative families. *Wis. STATE JOURNAL*, SEPT. 8, 1991, AT 3G, COL. 4.

The following cities have also provided some benefits for domestic partners: Alameda County, CA; Berkeley, CA; Ithaca, NY; Laguna Beach, CA; Los Angeles, CA; Madison, WI; Minneapolis, MN; New York, NY; Ottawa, Ontario, CANADA; San Francisco, CA; San Jose School District, CA; San Mateo County, CA; Santa Cruz, CA; Seattle, WA; Takoma Park, MD; Toronto, Ontario, CANADA; University of British Columbia, CANADA; West Hollywood, CA; Yukon Territory, CANADA. These plans vary widely. For example, in Madison, Wisconsin, the benefits are simply the ability to file as domestic partners and eligibility for city employees to use sick leave and bereavement leave to care for their family members. In San Francisco, California, benefits extend beyond recognition to inclusion by city employees of their alternative families on the city's health insurance plan.

<sup>6</sup> Cox, *supra* note 1, at 3 n.8. See also, National Center for Lesbian Rights Newsletter, *supra* note 5, at 3.

<sup>7</sup> One author estimates that the number of children living with a lesbian mother or gay father range from one to six million. N. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other*

Those parental relationships within alternative families that have received limited recognition are either based on a biological connection with the child or a marital relationship with the biological parent. Biological fathers living outside a marital relationship with their child's mother achieved constitutional protection against state interference with that relationship in *Stanley v. Illinois*.<sup>8</sup> This constitutional protection has been clarified in the twenty years following *Stanley* to protect unwed fathers who had developed substantial relationships with their children.<sup>9</sup> The only nonbiological parents who have been successful in maintaining the parent-child relationship developed during an ongoing alternative family relationship, even after that family relationship has dissolved, are adults who have marital relationships with the biological parent of the child.<sup>10</sup>

Unmarried heterosexual, gay, or lesbian nonlegal<sup>11</sup> parents in dissolving alternative families have been virtually unsuccessful in obtaining legal recognition of their parental, but legally unsanctioned, relationships with the children with whom they shared an alternative family relationship. This lack of success is unexpected given the courts' willingness to use both statutory interpretation and equitable doctrines to preserve the parental bonds between stepparents and the children in

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Nontraditional Families, 78 Geo. L.J. 459, 461 n.2 (1990). The number of children living with a stepparent was 6,789,000 in 1985. Family Resemblance, *supra* note 2, at 1640 n. 3. In fact, a lesbian mothers' "baby boom" has been growing for the past several years. It is estimated that thousands of lesbians around the country are having children, many of them with their partners. G. Kolata, Lesbian Partners Find the Means to Be Parents, N.Y. Times, Jan 30, 1989, A13, col. 1.

<sup>8</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>9</sup> *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). As this article will show, that recognition and protection has been compromised by the plurality decision in *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110 (1989). See *infra* Section IIa.

<sup>10</sup> *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987); *In re Paternity of D.L.H.*, 142 Wis. 2d 606, 419 N.W.2d 283 (Ct. App. 1987); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978); *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982); *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1979); *In re Marriage of D.L.J.*, 162 Wis. 2d 420, 469 N.W.2d 877 (1991); *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979); *Wills v. Wills*, 399 So. 2d 1130 (Fla. Dist. Ct. App. 1981); *Looper v. McManus*, 581 P.2d 487 (Okla. Ct. App. 1978); *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980); *Bryan v. Bryan*, 645 P.2d 1267 (Ariz. Ct. App. 1982).

<sup>11</sup> This term is used to denote the adult member of alternative families who has no legal tie to the child of those families. Those children are usually biologically related or legally related by adoption to the other adult member of the family. Although courts considering these cases tend to refer to these nonlegal parents as "biological strangers," *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 654-655, 572 N.E.2d 27, 28, 569 N.Y.S.2d 586, 587 (1991) or "non-parents," *In re the Interest of Z.J.H.*, 162 Wis. 2d 1002, 1010, 471 N.W.2d 202, 205 (1991), the use of the term "nonlegal parent" in this article is intended to recognize the parental bonds between the adult and child. These parental bonds were developed with care and nurturing and deserve not to be severed through the use of terms that ignore those bonds.

those alternative families.<sup>12</sup> Expansive statutory interpretation and application of equitable doctrines have been used by courts to mediate the harsh results that occurred at divorce due to the lack of a legal connection between the stepparent and his or her spouse's children.<sup>13</sup> The courts, however, have been unwilling to mediate similar harsh results that occur with the dissolution of nonmarital-based, alternative families.

A review of three specific cases from New York, Wisconsin, and California involving claims by lesbian nonlegal parents illuminates the series of legal maneuvers used by appellate and supreme courts to deny these parents an opportunity to continue a relationship with their<sup>14</sup> children.<sup>15</sup> While these denials have all involved lesbian families and may indicate a greater level of reluctance to recognize parental bonds in same-sex alternative families,<sup>16</sup> they exist as precedent that can be used to deny recognition to all alternative families regardless of the sexual orientation of the adults in the family.<sup>17</sup> This precedent shows an unwillingness by the courts to expand recognition beyond those alternative families that are marital-based.

All three decisions have included a claim by the majority that the state legislature is the proper forum for attempts to preserve the parental relationships between nonlegal parents and their children in dissolving alternative families.<sup>18</sup> While legislation would be a preferable

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<sup>12</sup> Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 914-915 (1984). The equitable doctrines used include the doctrines of equitable estoppel, equitable parenthood, de facto parenthood, and in loco parentis. *Id.* For a fuller discussion of these doctrines and their application, see *infra* Section I.

<sup>13</sup> *Id.*

<sup>14</sup> Just as the term "nonlegal parent" is used to refer to the co-parents in alternative families and to recognize their relationships with the children in their families, I use the "possessives" "his", "her," or "their" to signify the attachment between nonlegal parents and their children.

<sup>15</sup> The cases are the following: *In the Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 471 N.W.2d 202 (1991); *Nancy S. v. Michelle G.*, 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1st Dis. 1991).

<sup>16</sup> Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *Hast. L.J.* 799, 947-948 (1979).

<sup>17</sup> This denial is particularly poignant for lesbian and gay families because the adults in those families cannot obtain legal recognition of their relationship with the biological parent in the way that heterosexual unmarried couples can do through marriage. "Lesbian and gay people in our society cannot attain a legally recognized marriage." Colker, *Marriage*, 3 *Yale J.L. & Feminism* 321, 321 (1991). While I am not advocating that heterosexual couples should be forced to marry to receive either benefits or protection of their parental bonds to their children, this option remains unavailable to lesbians and gay men.

<sup>18</sup> For a more detailed discussion of this issue, see *infra* Section III.

method for obtaining this protection,<sup>19</sup> this abdication by the courts of their responsibility to use the means available to them is troublesome for several reasons. First, the possibility of political victory is extremely limited and would require the expenditure of immense resources and a significant amount of time.<sup>20</sup> Additionally, in the area of protecting gay men and lesbians, experience establishes that legislative change often results in geographically localized change that is subject to the changing whims of the majority, as can be seen from the repeal efforts for both anti-discrimination and domestic partnership legislation.<sup>21</sup> These problems are particularly acute given the political right's attachment to the family as a political rallying card. Attempting to expand the definition of "family" and "parent" at the legislative level will take an expensive, elongated battle.

Additionally, many courts have recognized that gay men and lesbians, as members of a minority group, are rendered "politically powerless" in their dealings with the legislative system and are thereby particularly unable to obtain the legislative changes they seek.<sup>22</sup>

Despite the difficult battle that will occur to obtain this legislative change, those battles need to be fought. Only through specific legislative change recognizing the nonlegal parents' relationship with the chil-

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<sup>19</sup> Actually, the preferred mode of protecting these nonlegal parents would be by finding unconstitutional state laws that deny them recognition. This mode would be preferable to achieving changes in state statutes because it would provide protection on a nation-wide basis, rather than a piecemeal approach through 'individual states' statutes. The Supreme Court's decision in *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110 (1989), however, indicates that this constitutional protection is probably not forthcoming. See *infra* Section II(a) for a more detailed discussion of this case.

<sup>20</sup> See *infra* Section III, discussing the numerous problems of obtaining legislative recognition. Any attempts to achieve legislative change to protect alternative families or gay men and lesbians generally entails a significant amount of time. For example, passing a local alternative families' ordinance in Madison, Wisconsin, which provided city employees with the option of using their sick leave and bereavement leave to care for the family members and to change the zoning ordinance to permit alternative families to live in single-family neighborhoods, took over six years. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationships*, VIII St. Louis U. Pub. L. Rev. 299, 305 (1989). Passage of the Massachusetts Gay Civil Rights Bill, civil rights legislation protecting gay men and lesbians from discrimination in employment, housing, credit, and public accommodations, took a seventeen-year struggle. Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 Harv. C.R.-C.L. L. Rev. 549, 549 (1991) [hereinafter, *Sex, Lies and Civil Rights*].

<sup>21</sup> *Id.* at 557-558. Among the repeal efforts currently being attempted include the attempt to repeal the San Francisco domestic partners ordinance. The ordinance provides health benefits to registered domestic partners. Conklin and Mosley, *SF's Partners Law Targeted: Fundamentalists' Petition May Force Vote*, Bay Area Reporter, July 4, 1991, at 1, col. 5.

<sup>22</sup> See *infra* Section III, and cases cited therein discussing attempts by gay men and lesbians to obtain constitutional protection as a quasi-suspect class from discrimination on the basis of sexual orientation under the 14th Amendment's equal protection clause.

dren in their alternative families will any type of security adhere to those relationships. State legislatures need to provide a comprehensive statutory scheme providing broad-based parental rights to nonlegal parents who qualify for parental status.

While that change is occurring, however, the relationships between nonlegal parents and children in alternative families will continue to be destroyed at a frightening rate.<sup>23</sup> Personal lives and relationships, especially those between parents and young children, cannot withstand the glacial pace that legislative change, if any, will take.

Because legislation does not currently exist in most states<sup>24</sup> and new legislation will take a long time to obtain, nonlegal parents of alternative families faced with losing their children have turned to the courts seeking individualized solutions for preserving their parental bonds with their children. These nonlegal parents and children have sought relief from the judicial system to protect them while the legislative struggle goes forward. But so far that relief has been denied.

It has been denied despite the numerous possibilities that exist, under statutory interpretation or under existing equitable theories, to preserve their relationships with their children. No new legislation must be passed before their relationships can be recognized. Most states have statutes that could easily be interpreted to protect these nonlegal parents and children. Numerous equitable theories also could be applied to protect these relationships.

Given the real possibility of legislative denial of recognition and the increasing numbers of courts who are following that denial with case-by-case denial, one begins to understand the impact of this frustrating, unfair refusal to protect legitimate parental rights. By taking the time to analyze these courts' opinions, one realizes that the judicial system has abdicated its responsibility to use the means available to it to address this serious problem encountered by thousands of families across the country. Rather than using traditional conceptions of the family to close the courthouse door in the faces of alternative family members, the legal system must come to grips with the real problems facing both the nonlegal parents and the children living in these fami-

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<sup>23</sup> The fact that three state appellate courts have all addressed this issue within a three month period in 1991 indicates that this problem is occurring in significant numbers across the country. Additionally, the Minnesota Court of Appeals recently decided a case involving lesbian parents in *Kulla v. McNulty*, 472 N.W.2d 175 (1991). Before the New Mexico Court of appeals, a similar case, *Couch v. Bellestri*, is pending. For a more detailed discussion of the *Kulla* case, see *infra* note 281.

<sup>24</sup> See *infra* notes 277-281 and accompanying text which discusses legislation in Oregon and Minnesota that has begun to resolve these problems.

lies. For while the legal system can maintain its cavalier denial of recognition, it ignores the pain, trauma, and heartache it is engendering with its callous attitude toward these adults and their children.

Part I of this article discusses the legal system's recognition of parental rights and enumerates the possible constitutional, statutory, and equitable theories available for protecting the parental rights of nonlegal parents. Part II considers the cases that have rejected the attempts by members of alternative families to use these theories to obtain this protection. Part III discusses the barriers to political power that will make it extremely difficult and time-consuming to achieve legislative change in these areas, and argues that the courts should use the means available to them currently to protect these nonlegal parents and their children while the legislative battles continue.

#### I. THE CURRENT DEFINITION OF PARENTHOOD AND THE THEORIES THAT COULD EXPAND THAT DEFINITION TO INCLUDE THE NONLEGAL PARENTS OF ALTERNATIVE FAMILIES

Parenthood is an exclusive status in the law, meaning that the law recognizes only two parents for a child at any one time<sup>25</sup> and only recognizes one parent of each sex.<sup>26</sup> Due in part to its exclusive nature, parenthood is a powerful status. Parents have comprehensive rights over their children which operate against all others.<sup>27</sup>

Parents have the right to custody of their child; to discipline the child; and to make decisions about education, medical treatment, and religious upbringing. Parents assign the child a name. They have a right to the child's earnings and services. They decide where the child shall live. Parents have a right to information gathered by others about the child and may exclude others from that information. They may speak for the child and may assert or waive the child's rights. Parents have the right to determine who may visit the child and to place their child in another's care.

Parents' duties correspond to their rights. Parents must care for their child, support him [or her] financially, see to his [or her] education, and provide him [or her] proper medical care. They have the duty to control the child, and if they fail in this duty, they may be required to answer for the child's wrongdoings.<sup>28</sup>

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<sup>25</sup> Bartlett, *supra* note 12, at 879.

<sup>26</sup> Polikoff, *supra* note 7, at 468.

<sup>27</sup> See Bartlett, *supra* note 12, at 884.

<sup>28</sup> *Id.* at 884-885.



The state imposes some restrictions on parents' rights over their children, but usually only as an effort to protect the child from injury or abuse by the parent.<sup>29</sup>

Given the broad rights and duties that parents have over their children, the legal system must limit the number of adults who have parental status. This is especially true because parental status is indivisible as well as exclusive.<sup>30</sup> Indivisibility means that each parent, with respect to his or her own child, has every right and duty given to parents.<sup>31</sup> If there are two parents, the law assumes that the parents will exercise their rights and duties in concert with one another; if there is one parent, the law provides that parent with all parental rights and duties.<sup>32</sup>

The indivisibility aspect of parenthood does make it difficult to provide parental rights and duties to numerous individuals. It would be difficult if several adults had to decide jointly how to make education or medical decisions. Obtaining agreement would also be difficult. Thus, the legal system chose the easiest and clearest possibility: each child naturally has only two parents; therefore, the legal system recognizes only those two parents.<sup>33</sup> This framework led Justice Scalia in the *Michael H.* decision to state "California law, like nature itself, makes no provision for dual fatherhood."<sup>34</sup>

But this framework immediately causes problems for the parents and children of alternative families, whether the adults are gay, lesbian, married, or unmarried. Oftentimes the children of these families do have two parents of the same sex, either living in the same household or living in different households. For example, a child born to married parents who divorce and then both remarry functionally may have two mothers and two fathers. A child with lesbian parents will have two mothers; a child with gay parents will have two fathers. These children usually do not have problems having multiple parents of the same sex, but the legal system founders upon this diversity.<sup>35</sup>

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<sup>29</sup> For example, states prevent parents from injuring their children severely when disciplining them; from making unconventional medical treatment that may cause death, even if based on religious grounds; from committing their child to a mental institution without review by professionals; from violating child labor laws; and from having unlimited options in educating them. *Id.* at 885.

<sup>30</sup> *Id.* at 883.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> This formulation itself is suspect. For example, the child who is born as a result of the artificial insemination of his mother with the sperm of an unknown donor only has two natural parents if parental status is accorded to the unknown father.

<sup>34</sup> *Michael H.*, 491 U.S. at 118.

<sup>35</sup> For example, the mental health of children raised in lesbian-mother households differs little from children raised in heterosexual-mother households. Polikoff, *supra* note 7, at 561.

The reality of a child's life does not depend upon legal rules. In assessing the rights of parents who do not fit the one-mother/one-father status, courts can either preserve the fiction of this status regardless of the child's reality, or they can recognize diversity and tailor rules accordingly. *They cannot, however, make the family life of all children uniform.* There will continue to be children whose functional fathers are not their biological fathers, there will continue to be stepparent relationships that look indistinguishable from biological parent relationships,<sup>36</sup> and there will continue to be lesbian-mother families.<sup>37</sup>

What the legal system has done is to refuse to recognize this difference between the traditional nuclear family and alternative families. By refusing to recognize the reality of alternative families, it is free to continue its theoretical stance of "one parent of each sex per child." But this refusal requires sacrificing the relationship between nonlegal parents and their children. The legal system presumes that only parental relationships that are legally based need to be protected. While it is important to protect parental autonomy<sup>38</sup> and to recognize the problems that may arise when multiple people have parental status,<sup>39</sup> the answer cannot be to refuse recognition to these nonlegal parents. This refusal, in itself, sacrifices parental autonomy. The reality is that nonlegal parents are parents. In many cases, to their children, they are

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The quality of mothering, not the sexual orientation of the mother, is what matters most in a child's mental health. *Id.* at 561-562. One court has held that children may benefit from being raised by gay or lesbian parents because they "emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice." *Id.* at 570 (citing *M.P. v. S.P.*, 169 N.J. Super 425, 404 A.2d 1256 (App. Div. 1979)).

<sup>36</sup> Bartlett points out that, while a stepparent is psychologically a stranger to a child at first, he or she is also the adult who is closest to the child's parent. Additionally, according to the common law, the stepparent-stepchild relationship does not give rise to any legal rights or obligations. Bartlett, *supra* note 12, at 912-913. The stepparent does not need to accept the child or support the child. While the stepparent can be recognized as standing in loco parentis to his or her stepchild, that is not the same as legal parenthood. The stepparent may abandon the in loco parentis relationship at any time and, because the relationship is based on the marriage of the natural parent and the stepparent, it disappears upon divorce. *Id.* at 913-914.

<sup>37</sup> Polikoff, *supra* note 7, at 473.

<sup>38</sup> For example, weakening the legal requirement for parental autonomy has led to some non-parents, such as grandparents, being successful in obtaining custody from lesbian biological mothers. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, XIV Rev. L. & Soc. Change 907, 910 (1986).

<sup>39</sup> These same problems can occur, however, when biological parents have problems resolving issues between them when they divorce. Just as the judicial system is able to resolve them in those situations, it can also resolve them when they arise between nonlegal parents and legal parents.

indistinguishable from the parent who is legally recognized. Both parents may have been part of the child's life since his or her first awareness. Both parents provide the caretaking functions that the child depends on and expects.<sup>40</sup> The child *knows* that the nonlegal parent is his or her parent. The only problem is that the legal system does not share that knowledge.

What is most discouraging for these nonlegal parents is that this refusal of recognition and protection by the legal system is unnecessary. New legislation, while preferable, does not need to be passed. New theories do not need to be developed. Instead, the legal system could use the numerous options available to it for recognizing alternative families and provide protection to the nonlegal parents and the children of these families.

Some of the current options available for recognizing alternative families include (1) providing constitutional protection to alternative families, as is provided to traditional families; (2) interpreting existing statutes' use of the term "parent" to include nonlegal parents; (3)

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<sup>40</sup> Numerous stories exist of alternative families living in situations that are virtually identical to traditional families.

Maria and Julie are just like any other Canadian couple with young kids. "We're tired all the time and we never have sex," says Maria. . . . [O]ur fears, hopes, ambitions, our desires for our children are no different from the person down the block." Maria and Julie are lesbians and mothers. They have two children, a 5-year-old boy and a 1 1/2-year-old girl. . . . In day-to-day life, she and Julie don't play mommy or daddy roles, she says, they're just themselves. "I take out the garbage and she tends to cook. I put the kids to bed, while she does the dishes and cleans up the kitchen. Our values and methods of discipline are quite similar."

Scotton, *Gay Parents*, Toronto Star, July 2, 1991, at F1.

Janice and Crystal are living as a family with Crystal's two daughters. Janice is a non-biological mother and co-parent for Crystal's two daughters. Janice and Crystal have the children in their home every other week under a joint custody arrangement with the children's father. Janice is completely involved in feeding, caring for, and raising the girls, from preparing meals, taking them to school, bathing them, reading bedtime stories, instilling responsibility in the girls to care for themselves, and encouraging the girls to share their lives with her. She has both physical and emotional responsibility for the girls and is treated within the family as a co-parent. . . . However, outside the family, Janice's role in the girls' lives and her responsibility for them is not recognized. . . . Janice's [employer refuses] to allow her to use her sick leave to care for the girls when they are sick even though sick leave is given to her co-workers who are biological parents or stepparents to care for their children. If Crystal did not receive employer-based insurance which covered the girls, Janice would want to be able to provide insurance for her family but would be unable to do so. If Crystal were ill or unable to care for the girls, Janice would want to take over the girls' care, but would be prevented from doing so.

Cox, *supra* note 20, at 312-313.

applying either Bartlett's or Polikoff's theories to alternative families to aid in defining statutory terms in a reasoned manner; and (4) applying various equitable doctrines to alternative family arrangements, including equitable parenthood, equitable estoppel, in loco parentis, and de facto parenthood.<sup>41</sup> But the courts have rejected each of these theories in the context of one or another factual situation facing alternative families.

#### A. Constitutional Protection

The preferable mode of obtaining protection for these parents and children would be to obtain a national solution by achieving constitutional protection for parents and children in alternative families. Given the increasingly conservative tenor of the federal courts,<sup>42</sup> this option may seem unlikely. Despite this political restriction, existing constitutional doctrine would support such an attempt.

The Supreme Court has consistently protected traditional families and parents from state laws impinging on them.<sup>43</sup> For example, in *Pierce v. Society of Sisters*,<sup>44</sup> the Court reviewed a state statute requiring parents and guardians to send their children to public school. The Court held that the statute violated the fourteenth amendment's due process clause because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>45</sup> Additionally, in *Moore v. East Cleveland*,<sup>46</sup> the Court focused on the liberty interest at stake when a city attempted to prohibit extended family members from choosing to live in a single-family home.<sup>47</sup> The Court noted that it "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the fourteenth amendment."<sup>48</sup> Numerous cases have relied on *Meyer v. Nebraska*<sup>49</sup> and

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<sup>41</sup> See *infra* Section I(4).

<sup>42</sup> Sex, Lies and Civil Rights, *supra* note 20, at 551-552.

<sup>43</sup> See Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 Berk. Wom. L.J. 134, 152-153 (1987-88); Note, Family, Marriage, and the Same-Sex Couple, 12 Cardozo L. Rev. 681, 698-699 (1990).

<sup>44</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>45</sup> *Id.* at 534-535.

<sup>46</sup> *Moore v. East Cleveland*, 431 U.S. 494 (1977).

<sup>47</sup> The East Cleveland ordinance would have forbidden a grandmother, her son, and her two grandchildren, who were cousins, from living in the grandmother's home in a single-family neighborhood. *Id.* at 496.

<sup>48</sup> *Id.* at 499 (quoting *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-640 (1974)).

*Pierce* to protect freedom of choice regarding family life and childbearing, parental rights to custody and companionship, and traditional parental authority in childrearing and education.<sup>50</sup> Thus, nonlegal parents of alternative families could argue convincingly that this history of constitutional protection for parents and families is available for extension to their alternative families.

### B. Statutory Interpretation

Another option would be to define terms in state statutes that regulate parenthood in matters such as custody and visitation so that they do not restrict parenthood to those related by blood or adoption.<sup>51</sup> Most state statutes do not define the term "parent" as used in custody and visitation statutes.<sup>52</sup> Whether a court is willing to interpret such a statute to extend to nonlegal parents depends on the court's views on statutory interpretation. For example, courts using a formal approach to statutory interpretation interpret undefined terms such as "parent" to refer to traditional family members unless explicit language compels recognition of alternative families.<sup>53</sup> Other courts, however, prefer a functional approach which recognizes the paradigm of the nuclear fam-

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<sup>49</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923). In that case, the Court considered the constitutionality of a Nebraska statute that prohibited teaching of any language other than English before the eighth grade. The Court found that the liberty interest protected by the Fourteenth Amendment prohibited such a restriction. The Court noted that liberty "denotes not merely freedom from bodily restraint but also the right of [individuals] to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free [people]." *Id.* at 399 (emphasis added).

<sup>50</sup> See Cox, *Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and Webster v. Reproductive Health Services*, 1990 Utah L. Rev. 543, 565 nn.141-143 for a list of these cases and a further discussion of the liberty interest contained in the Fourteenth Amendment.

<sup>51</sup> State law controls the definition of family and parent. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

<sup>52</sup> Each of the state statutes involved in the following cases did not exclusively define the term "parent" to be restricted to natural or adoptive parents: *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *Nancy S. v. Michele G.*, 228 Cal. App.3d 831, 279 Cal. Rptr. 212 (1991); *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 471 N.W.2d 202 (1991).

<sup>53</sup> *Family Resemblance*, *supra* note 2, at 1640-1641. These courts tend to believe that it is the legislature's role to expand the definition of family beyond the traditional nuclear family. *Id.* at 1647. Others refuse to interpret these terms broadly because they find inherent social value in traditional institutions such as marriage and biological or adoptive parenthood and believe that legal recognition should be granted by the state as an incentive to promote these traditional relationships. *Id.*

ily but recognizes alternative families as well.<sup>54</sup> These courts are less deferential to the legislature and are willing to expand the definition of family to incorporate social changes and meet the changing needs of society.<sup>55</sup> While the specific legislative history of a given statute may not indicate that the legislature actually considered such an expansive definition, the courts have been willing to expand the definition when the cases were more "palatable."<sup>56</sup>

### C. Using Bartlett's or Polikoff's Theories

As part of defining the term "parent" in these state statutes or in expanding equitable theories to include nonlegal parents, courts may find it useful to consider Bartlett's or Polikoff's theories to provide a reasoned approach on which to base their analysis.<sup>57</sup> While most state legislatures probably did not have such intricate theories in mind when leaving the term "parent" undefined, they must have intended to provide the courts with some flexibility. Otherwise, the legislature could have defined "parent" in these statutes as the biological or adoptive parents of the child.<sup>58</sup> Therefore, in interpreting these undefined terms, the courts could choose one of these theories as the basis for its interpretation.

Bartlett argues that courts, in broadening the definition of parent beyond exclusivity, should consider three factors in deciding whether another adult should be recognized as the child's parent. Those factors are (1) the adult should have had physical custody of the child for at least six months,<sup>59</sup> (2) the adult must demonstrate that his or her motive in seeking parental status is based on genuine care and concern

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<sup>54</sup> Id. at 1641.

<sup>55</sup> Id. at 1647. These courts tend to find that alternative families provide the same social benefits as traditional families and are willing to interpret statutory terms to include them. Id. at 1647-1648.

<sup>56</sup> *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978); *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982). Both involved interpretation of visitation statutes in stepparent cases.

<sup>57</sup> Bartlett, *supra* note 12; Polikoff, *supra* note 7. These two articles are extremely insightful in laying the groundwork for courts to use in recognizing alternative families. This article does not attempt to repeat the exhaustive analysis found in those articles. A reader looking for a full historical and broad-based understanding of this field is well advised to review those articles.

<sup>58</sup> For example, the dissent in *Alison D.* suggested just this approach and incorporated some of Bartlett's factors in its suggestion for defining "parent" in the New York statutes. 77 N.Y.2d at 659, 569 N.Y.S.2d at 590, 572 N.E.2d at 31 (Kaye, J., dissenting).

<sup>59</sup> Bartlett, *supra* note 12, at 946-947. This factor helps the courts avoid inappropriately conferring parental status on potential claimants, such as babysitters, neighbors, and distant relatives.

for the child,<sup>60</sup> and (3) the adult must establish that the relationship with the child began with the consent of the child's legal parent or under court order.<sup>61</sup> Once the nonlegal parent establishes all three factors, the court should then decide whether and in what way to protect that parent-child relationship.<sup>62</sup> The courts in these cases should consider each parent as eligible for primary custody, joint custody with another parent, or visitation.<sup>63</sup> In making its decision, the court should focus on the child's welfare, rather than on the parent's rights, while being careful not to assume that children cannot adjust to complex associations or have more than one mother or father.<sup>64</sup> The court should focus on the child's need to remain in contact with the adult, rather than focusing on the amicability of the relationships between the adults.<sup>65</sup>

Polikoff advocates a doctrine of functional parenthood: parenthood should be conferred on anyone in a functional parental relationship created by a legally recognized parent with the intent that the relationship be parental in nature.<sup>66</sup> Polikoff's doctrine does not require any specific length of time in residence with the child because residency is an imperfect proxy for quality of relationship with the child.<sup>67</sup> Instead, a mutuality requirement will screen out claimants such as babysitters and neighbors without needing the additional residency requirement.<sup>68</sup> Additionally, courts should not confer parental status on nonlegal parents unless the legal parent consents to or cooperates in the formation of an explicit parent-child relationship between that adult and his or her child.<sup>69</sup> Just as mutuality requires that the child consider the nonle-

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<sup>60</sup> *Id.* at 947. Bartlett refers to this factor as mutuality. She says that nonlegal parents need to demonstrate a desire to act out of concern for the child, which is presumed to exist in natural parents. Mutuality also ensures that the child perceives the adult's role to be that of a parent, rather than as a temporary babysitter or companion under the direction of the natural parent. *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 948.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 948-949.

<sup>66</sup> Polikoff, *supra* note 7 at 483 n.114. The primary problem with the intent criterion is that, as the New York, Wisconsin, and California cases below illustrate, the legal parent may consider the nonlegal parent to be a parent within the confines of an ongoing, intact family unit while changing that belief once the family unit dissolves. Thus, some form of objective evidence, rather than simply the subjective opinion of the legal parent, would be needed to avoid the legal parent from claiming, in court, that he or she never considered the other adult to be a parent to his or her child.

<sup>67</sup> *Id.* at 490.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

gal parent to be a parent, so too the legal parent should also consider the nonlegal parent to be a parent.<sup>70</sup>

Both of these scholars are as concerned as the courts with preserving parental autonomy.<sup>71</sup> Both of their theories protect this autonomy by requiring the legal parent to have begun the relationship that exists between nonlegal parent and child. By protecting parental autonomy in this way, they ensure that the legal parent's status is not affected without his or her actual participation. Either of their formulations would provide courts with enough guidance to make decisions whether and to what extent nonlegal parents from alternative families should be able to continue their relationships with their children.

#### *D. Equitable Theories*

Finally, equitable theories are available that could be applied to all alternative families that would provide the courts with the means to resolve these cases so as to recognize and protect the relationship between nonlegal parents and their children. Among these theories are those of equitable parenthood, equitable estoppel, in loco parentis, and de facto parenthood. Each of these theories has been used by various courts to handle situations outside the traditional nuclear family.<sup>72</sup> Reviewing the cases that have used these theories establishes that courts use them only to assist nonlegal parents who have a legal relationship, such as marriage, with the legal parent. The courts refuse to use these doctrines to assist nonlegal parents who do not have some type of legal relationship with the legal parent, such as parents in gay or lesbian families or in unmarried heterosexual families.<sup>73</sup>

For example, the Michigan courts have developed the doctrine of equitable parenthood to permit the husband of a legal parent to continue a parental relationship with his spouse's child. In one case, the court of appeals determined that a husband was the equitable parent of his spouse's four-year-old son and entitled to be considered a parent for custody and visitation purposes.<sup>74</sup> The court imposed three requirements before recognizing the husband as an equitable parent: (1) the husband and the child must mutually acknowledge a parental relationship or the mother must have cooperated in developing that

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<sup>70</sup> Id.

<sup>71</sup> Bartlett, *supra* note 12, at 944; Polikoff, *supra* note 7, at 491.

<sup>72</sup> See *infra* notes 74-93 and accompanying text.

<sup>73</sup> For a discussion of the rights of biological parents to a continued relationship with their children when not married, see *infra* Section II(a).

<sup>74</sup> *Atkinson v. Atkinson*, 160 Mich. App. 601, 602-603, 604 N.W.2d 516, 517-518 (1987).



relationship over a period of time, (2) the husband wants to have parental rights, and (3) the husband is willing to take on the responsibility of child support.<sup>75</sup> The court based its decision on the fact that existing case law would support imposing child support obligations on the husband in such a case, and thus, it was reasonable to acknowledge corresponding parental rights.<sup>76</sup>

The courts could use this theory when faced with dissolution of alternative families beyond those based on marriage. Although a court could distinguish other cases because the parties were not married, the rationale for the court's decision establishing equitable parenthood does not require that result.<sup>77</sup> Rather than refashioning the test to require marriage, the court, instead, could focus on the relationship between the nonlegal parent and the child and on the legal parent's cooperation in developing the relationship.<sup>78</sup> Thus, a nonlegal parent in an alternative family could meet all three prongs and have equitable parenthood applied to recognize his or her relationship with the child(ren) of the family.

Another possibility would be to use the doctrine of equitable estoppel to prevent or estop the legal parent from denying that a parental relationship existed between the nonlegal parent and the child. Equitable estoppel requires (1) action or non-action which induces (2) reliance by another (3) to his or her detriment.<sup>79</sup> Courts primarily use this doctrine to require a nonlegal parent to pay child support,<sup>80</sup> although it has been used to maintain the parent-child relationship between a nonlegal parent and his child. For example, one court acknowledged that the doctrine could be used as a defense to prevent the mother from claiming that her former husband was not her child's father.<sup>81</sup> Thus,

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<sup>75</sup> *Id.* at 608-609, 604 N.W.2d at 519.

<sup>76</sup> *Id.* at 610, 408 N.W.2d at 520.

<sup>77</sup> Polikoff, *supra* note 7, at 485.

<sup>78</sup> *Atkinson*, 160 Mich. App. at 608-609, 408 N.W.2d at 519.

<sup>79</sup> *In re Paternity of D.L.H.*, 142 Wis. 2d 606, 615-616, 419 N.W.2d 283, 287 (Ct. App. 1987)(citing *Mowers v. City of St. Francis*, 108 Wis. 2d 630, 633 (Ct. App. 1982)).

<sup>80</sup> Polikoff, *supra* note 7, at 491. The New York courts have used the doctrine to enforce parental support from a nonlegal parent when the child would not have entered the family "but for" the actions of the nonlegal parent. *Id.* at 492-493 (citing *Karin T. v. Michael T.*, 127 Misc. 2d 14, 484 N.Y.S.2d 780 (Fam. Ct. 1985), *Werner v. Werner*, 35 A.D.2d 50, 312 N.Y.S.2d 815 (2d Dep't 1970); *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). Other courts have also noted that the doctrine was used frequently to prevent putative fathers from denying paternity. *In re Paternity of D.L.H.*, 142 Wis. 2d at 615, 419 N.W.2d at 286 (citing *In re Adoption of Young*, 169 Pa. 141, 364 A.2d 1307 (1976)); *A.M.N. v. A.J.N.*, 141 Wis. 2d 99, 414 N.W.2d 68 (Ct. App. 1987).

<sup>81</sup> *In re Paternity of D.L.H.*, 142 Wis. 2d 606, 614-616, 419 N.W.2d 283, 286 (1987). The husband claimed that he relied on the mother's representations by developing a parental relationship with the child and by not pursuing adoption proceedings and that the mother had

this theory would make it possible for nonlegal parents to prevent the legal parent from claiming in court that only the legal relationship between him or her and the child should be recognized.

Another option is using the doctrine of *in loco parentis* to protect the parental relationship of nonlegal parents in alternative families. This doctrine has been used frequently in stepparent cases.<sup>82</sup> Under *in loco parentis* doctrine, anyone who voluntarily assumes the status of parent may incur support and education obligations.<sup>83</sup> This doctrine is usually limited in stepparent cases because the common law has allowed the stepparent to abandon *in loco parentis* status at any time, and particularly when the relationship to the legal parent ends in divorce or death.<sup>84</sup> However, courts have manipulated the common law or stretched statutory law to allow for stepparent custody and visitation even when the underlying marital relationship between the legal parent and the stepparent has ended.<sup>85</sup>

For example, one court construed a visitation statute allowing visitation to "parents, grandparents, and other relatives"<sup>86</sup> to include stepparents standing *in loco parentis*.<sup>87</sup> Another court allowed visitation based on a statute granting visitation for any "child of the marriage"<sup>88</sup> by finding that the stepchild was a child of the marriage due to the stepfather's *in loco parentis* status.<sup>89</sup> Finally, another court protected a stepparent's right to visitation by finding that, just as it was against public policy to destroy the relationship between a parent and child, it was against public policy to destroy the relationship between a stepparent standing *in loco parentis* and the child.<sup>90</sup> The doctrine of *in loco parentis* would make it possible for courts to prevent the destruction of the relationship between the nonlegal parent and the child when their alternative family dissolves.

A final possibility would be to use the doctrine of *de facto* parenthood to protect the relationship between nonlegal parents and their children. A *de facto* parent is one who, "on a day-to-day basis, assumes the role of the parent, seeking to fulfill both the child's physi-

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obtained child support upon divorce by claiming that the child was one of the marriage. Polikoff, *supra* note 7, at 497 n.190.

<sup>82</sup> Bartlett, *supra* note 12, at 913.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 913-914.

<sup>85</sup> *Id.* at 914-917 and cases cited therein.

<sup>86</sup> Utah Code Ann. § 30-3-5(4)(1989).

<sup>87</sup> Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978).

<sup>88</sup> Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982).

<sup>89</sup> Bartlett, *supra* note 12, at 915.

<sup>90</sup> Spells v. Spells, 250 Pa. Super. 168, 175, 378 A.2d 879, 883 (1979).

cal needs and his [or her] psychological need for affection and care.”<sup>91</sup> The California Supreme Court noted the important role that the de facto parent plays in a child’s life and noted that “[t]he simple fact that a person cares enough to seek and undertake to participate goes far to suggest that the court would profit by hearing his [or her] views as to the child’s best interests.”<sup>92</sup> The interests of de facto parents in continuing the relationship with their child is a substantial one, recognized by the courts of many jurisdictions, and deserving legal protection.<sup>93</sup>

As this summary has established, the judicial system would only need to expand the factual scenarios under which these equitable theories could be applied in order to provide protection and recognition to the nonlegal parents of alternative families. Unfortunately for the individuals involved in these families, the courts have consistently refused to do so. They have rejected repeated attempts by members of alternative families to use those means currently available to prevent their parental bonds from being ignored and destroyed. A review of the cases rejecting these attempts illustrates the analytical gyrations the courts have had to employ to deny their assistance.

## II. COURTS’ REFUSAL TO USE THE DOCTRINES AVAILABLE TO THEM TO PROTECT NONLEGAL PARENTS IN ALTERNATIVE FAMILIES

This section reviews several cases that have considered and rejected the options discussed above as means for finding protection and recognition of the nonlegal parents of alternative families. The first portion discusses the Supreme Court’s refusal to broaden the definition of parenthood and family that qualifies for constitutional protection under the due process clause of the fourteenth amendment. The second portion discusses various state courts’ refusals to use statutory interpretation or existing theories to broaden the definition of parent. As this discussion will show, the courts have been analytically unconvincing in their attempts to justify these refusals.

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<sup>91</sup> *In re B.G.*, 11 Cal. 3d 679, 692 n.18, 114 Cal. Rptr. 444, 453 n.18, 523 P.2d 244, 253 n.18 (1974). The California Supreme Court adopted this definition from Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 98 (1973). Those authors referred to such a person as a “psychological parent” and defined the day-to-day relationship as one established through interaction, companionship, and interplay which fulfills the child’s psychological needs for a parent as well as his or her physical needs. *Id.*

<sup>92</sup> *In re B.G.*, 11 Cal. 3d at 692 n.18, 114 Cal. Rptr. at 453 n.18, 523 P.2d at 253 n.18.

<sup>93</sup> *Id.* at 692-693, 114 Cal. Rptr. at 453, 523 P.2d at 253.

A. *Turning to the Supreme Court for Constitutional Protection of NonLegal Parents in Alternative Families*

Given the Supreme Court's traditional protection of both parents and families under the due process clause, one would expect that those seeking to protect alternative families could turn to the constitution to obtain similar protection for their families. But the Court has shown reluctance to provide this protection to alternative families. In *Village of Belle Terre v. Boraas*,<sup>94</sup> the Court refused to protect an alternative family consisting of six college students from the impact of a Village zoning ordinance. That ordinance prohibited families other than those related by blood, marriage, or adoption or consisting of two unrelated individuals from living together in single-family neighborhoods.<sup>95</sup> In that case, the Court was concerned about the disruptive influence that a household of unrelated college students might cause in a single-family neighborhood.

It has been argued that *Belle Terre* does not provide clear guidance on how the Court might rule if faced with a similar suit by members of an alternative family consisting of unmarried heterosexuals, gay men, or lesbians and their children.<sup>96</sup> These alternative families more closely resemble the traditional nuclear family than unrelated college students. Thus, if faced with facts involving such an alternative family, the Court might provide it with similar constitutional protection.<sup>97</sup>

The plurality opinion in *Michael H. and Victoria D. v. Gerald D.*,<sup>98</sup> however, evinces an unwillingness by the Court to recognize alternative family arrangements, at least when they conflict with traditional families, and seems to limit constitutional protection to the "unitary" or "marital" family alone.<sup>99</sup> Because this "pinched" definition of the family<sup>100</sup> alone was found by the plurality to be entitled to constitutional

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<sup>94</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>95</sup> *Id.* at 2.

<sup>96</sup> Cox, *supra* note 1, at 15. The Court has been willing to recognize some families beyond the nuclear or extended family. In *Smith v. Organization of Foster Families for Equity and Reform*, 431 U.S. 816, 844 (1976), the Court recognized that deep, loving, and interdependent relationships can exist in the absence of a blood relationship. The Court stated that the foster family did deserve more recognition for its familial relationship than did a "mere collection of unrelated individuals." *Id.* at 844-845. But the foster family was also distinguishable from the "natural" family because it had its source in contractual arrangements set up by the state. Cox, *supra* note 1, at 8 n.26.

<sup>97</sup> *Id.*

<sup>98</sup> *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>99</sup> *Id.* at 124. The Court did acknowledge that some protection may be available to unmarried heterosexuals living in a family with their biological children. *Id.* at 123 n.3.

<sup>100</sup> *Michael H.*, 491 U.S. at 145 (Brennan, J., dissenting).

protection, the Court will probably not lead the movement to recognize alternative families and the parental rights of nonlegal parents within those families.

The Supreme Court's decision in *Michael H.* is based on what the plurality calls "extraordinary" facts.<sup>101</sup> In May 1976, Carole and Gerald were married and they established a home in California where they resided as "husband and wife" when either of them was not out of the country on business. In 1978, Carol became involved in an "adulterous affair" with Michael, a neighbor.<sup>102</sup> In September 1980, she conceived a child, Victoria, who was born on May 11, 1981, with Gerald listed as her father on the birth certificate. Gerald always acknowledged Victoria as his child, although Carole told Michael that she thought he was her father.

During the next three years, Victoria always lived with Carole, but Carole lived with Gerald, Michael, and another man at different times. In 1981, Carole and Michael took blood tests which established a 98.07% probability that Michael was Victoria's father. In 1982, Carole visited Michael in St. Thomas, his principal place of business, and Michael held Victoria out as his child while they were there.

In 1982, Michael filed a filiation suit in California Superior Court because Carole had refused to allow Michael to visit Victoria. In March 1983, the court appointed a guardian ad litem to protect Victoria's interests. Victoria then filed a cross-complaint stating that she wanted to maintain filial relationships with "both" her fathers.<sup>103</sup> From March to July of 1983, Carole and Victoria lived with Gerald in New York, and Carole filed a motion for summary judgment in May. However, in August, Carole and Victoria returned to California and Michael. For the next eight months, Carole, Michael, and Victoria lived together in Carole's apartment when Michael was not in St. Thomas on business. In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's natural father. A month later, Carole left Michael, returned to Gerald, and told her attorneys not to file the stipulation. Carole,

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<sup>101</sup> Id. at 113.

<sup>102</sup> The plurality insists on focusing on the "adulterous" nature of this relationship throughout its opinion. Justice Brennan notes in his dissent that the plurality refers to Michael as the "adulterous natural father" at least six times in its decision. Id. at 144 (Brennan, J., dissenting). It is interesting to note that the plurality always refers to Carole as the "mother" or "wife," even though it was she who was married, and thus committing adultery, at the time of her involvement with Michael.

<sup>103</sup> The plurality rejects the premise of her complaint by stating that "California law, like nature itself, makes no provision for dual fatherhood." Id. at 118.

Gerald, and Victoria continue to live together in New York along with two additional children of Carole and Gerald.

In May 1984, Michael and Victoria sought visitation rights for Michael. The psychologist involved in the case recommended that Carole retain sole custody but that Michael be allowed contact with Victoria on a restricted visitation schedule. The court concurred and ordered Michael to have visitation pendent lite. In October 1984, Gerald, who had intervened in the suit, moved for summary judgment based on Cal. Evid. Code § 621 which provides that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>104</sup> The only way to rebut the presumption is for the husband or wife to challenge it within two years of the child's birth, based on blood tests.<sup>105</sup> The natural father does not have any way to rebut the presumption himself.

In January 1985, the superior court granted Gerald's motion for summary judgment based on affidavits submitted by Gerald and Carole demonstrating that they were cohabitating at the time of Victoria's conception and birth and that Gerald was neither sterile nor impotent. The court denied Michael's and Victoria's challenges to the statute as unconstitutional and denied their motions for continued visitation under Cal. Civ. Code § 4601.<sup>106</sup> The court found that visitation would "violat[e] the intention of the Legislature by impugning the integrity of the family unit."<sup>107</sup> The California Court of Appeals affirmed the judgment of the superior court and upheld the constitutionality of the statute.<sup>108</sup> The court also denied Michael visitation rights.<sup>109</sup> The California Supreme Court denied discretionary review.

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<sup>104</sup> Cal. Evid. Code § 621(a) (West Supp. 1991).

<sup>105</sup> Cal. Evid. Code § 621(c) and (d) (West Supp. 1991). In order for the wife to be allowed to rebut the presumption, the natural father must have filed an affidavit asserting paternity. *Id.*

<sup>106</sup> Cal. Civ. Code § 4601 (West 1991) states:

Reasonable visitation rights [shall be awarded] to a parent unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation may be granted to any other person having an interest in the welfare of the child.

<sup>107</sup> *Michael H.*, 491 U.S. at 116.

<sup>108</sup> 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

<sup>109</sup> *Id.* at 1012-1013, 236 Cal. Rptr. at 825. It based its decision on the case of *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1987), which held that "once an assertion of biological paternity is 'determined to be legally impossible' under § 621, visitation against the wishes of the mother should be denied under § 4601." *Id.* at 627-628, 179 Cal. Rptr. at 13.

The plurality focused on the substantive due process aspect of Michael's claim "to be declared *the* father of Victoria"<sup>110</sup> and framed his argument as follows: "because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship."<sup>111</sup> The plurality denied his claim, noting that before Michael could be successful, he had to establish a constitutionally protected liberty interest in his relationship with Victoria.<sup>112</sup>

Michael must have felt confident in asserting that his relationship with Victoria was a liberty interest protected by the due process clause because he had no fewer than four Supreme Court decisions on which to base this assertion. Starting with *Stanley v. Illinois*,<sup>113</sup> Michael assumed that he had over twenty years of established Supreme Court precedent protecting the rights of unwed fathers to maintain relationships with their children.<sup>114</sup>

Justice White, in dissent, explained the basis for Michael's assumption. He reviewed the Court's decision in *Stanley* which recognized an unwed, biological father's right to maintain a legal relationship with his illegitimate children.<sup>115</sup> There, the Court held that the due process clause entitled the biological father to a hearing on parental fitness

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<sup>110</sup> The plurality noted immediately before that California law "makes no provision for dual fatherhood." It argued, thus, that Michael was trying to be declared Victoria's only father. However, the dissent pointed out that all Michael wanted was to be given a chance to establish his paternity. *Michael H.*, 491 U.S. at 148 n.7 (Brennan, J., dissenting). Whether any rights would flow from the status as legal father of Victoria would depend on the trial court's determination of Victoria's best interests. *Id.* at 156; See Cal. Civ. Code Ann. § 4601 (West Supp. 1989).

By construing Michael's claim as one of being declared *THE* father of Victoria, rather than as being given a chance to establish his paternity, the plurality can avoid the procedural due process issue raised by this case and, thus, more easily side-step the *Stanley* line of cases. 491 U.S. at 121. It noted that its prior irrebuttable presumption cases led it to analyze this case as calling into question "not the adequacy of procedures but . . . the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.* Thus, the plurality rejected Michael's procedural due process challenge and analyzed his claim under substantive due process. Justice Brennan rejected the majority's argument that this was simply a substantive due process claim, and, instead, argued that California was required to provide Michael with a hearing to prove his paternity of Victoria. *Id.* at 151-156 (Brennan, J., dissenting).

<sup>111</sup> *Id.* at 121.

<sup>112</sup> *Id.*

<sup>113</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>114</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

<sup>115</sup> *Michael H.*, 491 U.S. at 158. In *Stanley*, the unwed father, Peter Stanley, had provided care and support for his three children and their mother off and on for 18 years. Upon the death of Joan Stanley, the children automatically became wards of the state pursuant to an Illinois law which presumptively declared unwed fathers to be "unfit" parents. Stanley

before his children could be taken away from him and rejected "the State's treatment of Stanley 'not as a parent but as a stranger to his children.'" <sup>116</sup>

White then turned to *Quilloin* where the Court expressly recognized due process rights in the biological father, while holding that those rights were not impermissibly burdened by applying the best interests of the child standard.<sup>117</sup> He then considered *Caban* where the Court, interpreting the fourteenth amendment equal protection clause, invalidated a statute allowing an unwed father's children to be adopted by their mother and her husband without the father's consent.<sup>118</sup> Finally, consideration of this line of cases was completed with *Lehr*, where the court held against the father but stated that "fathers who have participated in raising their illegitimate children and have developed a relationship with them have constitutionally protected parental rights."<sup>119</sup> White noted that:

Indeed, the Court in *Lehr* suggested that States must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child. The court upheld a step-parent adoption over the natural father's objections, but acknowledged that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests

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challenged Illinois' authority to constitutionally deprive him of custody of his children, without first affording him an individualized hearing as to parental fitness.

<sup>116</sup> Id. (citing *Stanley*, 405 U.S. at 648).

<sup>117</sup> Id. at 158 (citing *Quilloin*, 434 U.S. at 255). In *Quilloin*, the mother of a child consented to the adoption of her child by her husband, who was not the child's biological father. Under Georgia law, the adoption was permissible if the mother gave her consent; consent by the unwed father was only required if he had formally legitimated his child. At issue was whether the constitutionally protected liberty interest recognized in *Stanley* extended to an unwed father who never shouldered any of the significant responsibilities of fatherhood.

<sup>118</sup> Id. at 158-159 (citing *Caban*, 441 U.S. at 380). Like *Quilloin*, *Caban* involved the constitutionality of a New York law which required the mother's, but not the father's, consent to adoption. Unlike Mr. Quilloin, however, Abdiel Caban had lived with his children and their mother, Maria Mohammed, for approximately five years, and continued to see them even after he and Maria ceased living together. The court distinguished the rights of unwed fathers who had never maintained a relationship with their children, and the rights of fathers, such as Peter Stanley and Abdiel Caban, who *had* maintained such a relationship.

<sup>119</sup> Id. at 158 (quoting *Lehr*, 463 U.S. at 261-262). In *Lehr v. Robertson*, the putative father claimed an adoption order in favor of the child's natural mother and her husband was invalid because he had never received advance notice of the adoption proceedings. Addressing the issue of parental rights once again, the court carefully analyzed the extent to which Mr. Lehr had availed himself of the opportunity to establish and maintain an ongoing relationship with his child. The court concluded that he had not demonstrated a full commitment to the responsibilities of parenthood, and absent his assumption of such parental duties, the mere fact of his biological link did not, by itself, merit equivalent constitutional protection.



of the child.” There, however, the father had never established a custodial, personal or financial relationship with his child.<sup>120</sup>

In particular, Justice White noted the factual basis for Michael’s assumption that he would be entitled to constitutional protection given those previous cases. Distinguishing Michael’s case from *Quilloin* and *Lehr* where the court found that the unwed fathers in those cases did not have a liberty interest in protecting their relationships with their children, White reasoned:

In the case now before us, Michael H. is not a father unwilling to assume his responsibilities as a parent. To the contrary, he is a father who has asserted his interests in raising and providing for his child since the very time of the child’s birth. In contrast to the father in *Lehr*, Michael H. had begun to develop a relationship with his daughter. There is no dispute on this point. Michael contributed to the child’s support. Michael and Victoria lived together (albeit intermittently, given Carole’s itinerant lifestyle). There is a personal and emotional relationship between Michael and Victoria, who grew up calling him “Daddy.” Michael H. held Victoria out as his daughter and contributed to the child’s financial support.<sup>121</sup>

White then applied the test from *Lehr* to the undisputed facts.<sup>122</sup> “When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the due process clause.”<sup>123</sup> White noted that the focus should be the relationship between father and child, *not the relationship between father and mother*.<sup>124</sup> White concluded that Michael H. “more than meets the mark” in establishing the constitutionally protected liberty interest recognized in the *Stanley/Lehr* line of cases.<sup>125</sup>

In order to avoid the impact of this twenty-year line of precedent, the plurality analyzed Michael’s interest solely in relation to the interest the state of California has in protecting the unitary, marital family. This analysis is the most threatening aspect of the opinion with respect to any possible protection for alternative families which the court might provide in the future. If the plurality had not shown its willingness to protect the unitary, marital family alone, given the “extraordinary facts” of the case, it would be possible in the future to confine *Michael*

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<sup>120</sup> Id. at 159 (citations omitted).

<sup>121</sup> Id. at 159-160.

<sup>122</sup> Id. at 160.

<sup>123</sup> Id. (citing *Lehr*, 463 U.S. at 261).

<sup>124</sup> Id. at 160.

<sup>125</sup> Id.

*H.* to its facts. It would then be possible to assume that *Michael H.* would not inflict any permanent damage on the *Stanley* line of cases establishing a protected liberty interest of unwed fathers in maintaining relationships with their children. More importantly, *Michael H.* could be distinguished in the same way as *Belle Terre*, and it could be assumed that it does not necessarily indicate an unwillingness by the Court to protect alternative families if faced with such a factual scenario.

The plurality's efforts to side-step those cases, however, established ominous dicta.<sup>126</sup> The plurality began by looking at the means the Court has used in the past to "limit and guide interpretation" of the due process clause's liberty interest.<sup>127</sup> It stated that, in order to be entitled to protection, a liberty interest must both be fundamental and "traditionally protected by our society."<sup>128</sup> The plurality's method of determining which liberty interests have been traditionally protected provided it with the lever necessary to push aside the *Stanley/Lehr* line of cases. It reinterpreted those cases, finding that they did not establish a protected liberty interest in "biological fatherhood plus an established parental relationship", factors that the plurality conceded "exist in the present case as well."<sup>129</sup>

Instead of this "distortion," the plurality believed that those cases rested "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>130</sup> Turning to the Court's decision in *Moore*

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<sup>126</sup> This is dicta because only Justices Scalia and Rhenquist join in this analysis. While this language could be cited as precedent in a later opinion, because it is a plurality opinion, it is not an authoritative statement of the Court's position on the constitutional issue involved. 3 Encyclopedia of the American Constitution 1397 (Leonard W. Levy ed, 1986).

<sup>127</sup> *Michael H.*, 491 U.S. at 122.

<sup>128</sup> *Id.* The plurality defended itself from Justice Brennan's assertion that its practice of limiting the Due Process Clause to traditionally protected interests turns it into a redundancy, *Id.* at 141, by arguing that its purpose is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones. *Id.* at 122, n.2. Finding this as the only liberty interest protected seems to run headlong into the notion of the Constitution as a living, breathing document capable of leading our nation into the future and encountering every changing demand of a growing, changing society. See e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952)(Vinson, C.J., dissenting)(citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

<sup>129</sup> *Michael H.*, 491 U.S. at 123.

<sup>130</sup> *Id.* at 123. Justice Brennan disagreed with that assertion.

The only difference between these two sets of relationships, however, is the fact of marriage. The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria. . . . However, the very premise of *Stanley* and the cases following it is that marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration. . . . It is important to remember, moreover, that in *Quilloin*, *Caban*, and *Lehr*, the putative

*v. East Cleveland*,<sup>131</sup> the plurality stated that “[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”<sup>132</sup>

It then framed the issue so as to deny Michael any constitutional protection and to protect Gerald and Carole’s “unitary family”:

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. *We think it impossible to find that it has.* In fact, quite to the contrary, *our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.*<sup>133</sup>

Having framed the issue this way, the plurality easily moved through the next several pages of its opinion verifying that California’s irrebuttable presumption has a long history and traditional place in Anglo-American jurisprudence.<sup>134</sup>

The Court looked to the legal tradition of protecting and presuming the legitimacy of children born into marital families as the basis for finding California’s presumption constitutional. It noted that the presumption could traditionally be rebutted only by showing that the husband was incapable of procreation or had been “beyond the four seas” during the period of conception.<sup>135</sup> It concluded that the policy underlying the severe restrictions on rebutting the presumption “appears to have been an aversion to declaring children illegitimate . . . and likely making them wards of the state.”<sup>136</sup> A secondary policy concern was promoting the peace and tranquility of the state and the family.<sup>137</sup>

The plurality then made its analytical error. It began by finding nothing in the older cases recognizing a natural father’s right to main-

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father’s demands would have disrupted a “unitary family” as the plurality defines it; in each case, the husband of the child’s mother sought to adopt the child over the objections of the natural father. Significantly, our decisions in those cases in no way relied on the need to protect the marital family. Hence the plurality’s claim that *Stanley*, *Quilloin*, *Caban*, and *Lehr* were about the “unitary family,” as that family is defined by today’s plurality, is surprising indeed.

Id. at 144-145 (Brennan, J., dissenting).

<sup>131</sup> *Moore v. East Cleveland*, 431 U.S. 494 (1977).

<sup>132</sup> *Michael H.*, 491 U.S. at 123-124 (citing *Moore*, 431 U.S. at 503).

<sup>133</sup> Id. at 124 (emphasis added).

<sup>134</sup> Id. at 124-127.

<sup>135</sup> Id. at 124.

<sup>136</sup> Id. at 125 (citations omitted).

<sup>137</sup> Id.

tain a relationship with a child born within the mother's existing marriage to another man.<sup>138</sup> It then considered more recent cases which do not generally acknowledge "the ability of a person in Michael's position to claim paternity."<sup>139</sup> This lack of traditional protection for the very claim that Michael made, in the context of these "extraordinary" facts, was enough for Justices Scalia and Rhenquist to conclude that Michael's relationship with Victoria was not deserving of due process protection. At this point, Justices O'Connor and Kennedy abandoned the plurality opinion.<sup>140</sup>

Scalia and Rhenquist asserted that no case existed that awarded "substantive parental rights to the natural father of a child conceived within and born into an extant marital union that wishes to embrace the child."<sup>141</sup> Since no previous case had granted the protection Michael sought, he had no basis for claiming "the stuff of which fundamental rights qualifying as liberty interests are made."<sup>142</sup>

In footnote 6, Justices Scalia and Rhenquist asserted that they must look for "historical traditions *specifically* relating to the rights of an adulterous natural father, rather than inquiring more generally 'whether parenthood is an interest that historically has received our attention and protection' " in deciding whether Michael's claim was deserving of constitutional protection as a fundamental liberty interest.<sup>143</sup> In determining which liberty interests are protected by the due process clause, they argued that they should

refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.<sup>144</sup>

Justices Scalia and Rhenquist then turned to *Bowers v. Hardwick*<sup>145</sup> to support their analysis.<sup>146</sup> In *Bowers*, the Court upheld a Georgia statute

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 132 (O'Connor, J., concurring in part).

<sup>141</sup> *Id.* at 127.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 127 n.6. (emphasis added).

<sup>144</sup> *Id.*

<sup>145</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>146</sup> *Michael H.*, 491 U.S. at 127 n.6. They also noted that *Roe v. Wade*, 410 U.S. 113 (1973) supported their conclusion because the majority there spent one-fifth of its opinion negating

prohibiting sodomy and supported its decision by focusing on the numerous state laws that prohibited sodomy at the time the fourteenth amendment was ratified.<sup>147</sup> The *Bowers* majority believed that, in light of those laws, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."<sup>148</sup> Thus, no fundamental right to engage in gay sodomy existed because of the historical proscriptions against those activities.<sup>149</sup> Similarly, Scalia and Rhenquist reasoned that no fundamental right existed for a natural father to claim constitutional protection of his relationship with his daughter who was born into her mother's marriage to another man.<sup>150</sup>

To use this much-maligned decision to support their reasoning shows the lack of support that Scalia and Rhenquist's reasoning engenders.<sup>151</sup> They then proceeded to make the same analytical error that the *Bowers* majority made. Just as the majority in *Bowers* erred by focusing too narrowly on whether constitutional protection existed for the practice of sodomy, so too Justices Scalia and Rhenquist focused too narrowly on whether constitutional protection existed for an adulterous father to maintain a relationship with his child. In *Bowers*, the Court erred by focusing on the practice regulated by the Georgia statute instead of recognizing the constitutional importance of protecting an individual's choice to engage in that practice in connection with con-

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the proposition that there was a longstanding tradition of laws proscribing tradition. *Id.* The reliance on *Roe* is misplaced. *Roe*'s protection of women's right to choose an abortion is based on the fundamental right of privacy and the liberty interest to make fundamental choices affecting an individual. See, Cox, *supra* note 50, at 575. For a broader discussion of the liberty interest in making these choices, see Cox, *supra* note 50, at 570-575.

<sup>147</sup> *Bowers*, 478 U.S. at 192-194. The *Bowers* court noted that all but 5 of the 37 states had criminal sodomy statutes, that all 50 states had those laws before 1961, and that 24 states and the District of Columbia continue to have those laws on their statute books. *Id.*

<sup>148</sup> *Id.* at 194 (emphasis in original). It should be noted that this same claim has been raised as a basis for overturning the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) to protect a woman's right to choose an abortion. See Bopp and Coleson, *The Right To Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 220-221 (1989). For a reply to that argument, see, Cox, *supra* note 50, at 573-577.

<sup>149</sup> *Bowers*, 478 U.S. at 192.

<sup>150</sup> *Michael H.*, 491 U.S. at 128 (citations omitted).

<sup>151</sup> For a list of some of the articles condemning the Court's decision in *Bowers*, see Cox, *supra* note 50, at 575 n.201. Additionally, in an October 23, 1990 telephone interview, former Justice Powell was quoted as saying, "I think I probably made a mistake in that one," referring to his concurring opinion in *Bowers v. Hardwick*, which provided the crucial "swing vote" for the majority 5-4 decision. Further elaborating on his misgivings over the *Bowers* decision, Mr. Powell stated that, "When I had the opportunity to reread the opinion a few months later, I thought the dissent had the better of the arguments." Agneshwar, *Ex-Justice Says He May Have Been Wrong; Powell on Sodomy*, National Law Journal, Nov. 5, 1990, at 3.

cepts of privacy and personhood.<sup>152</sup> The question in *Bowers* should not have been whether the practice of gay sodomy was legal or illegal historically, but rather whether the Constitution protects an individual's choice to practice gay sodomy.<sup>153</sup> So too, in this case, the question should not have been whether adulterous fathers' relationships with their children have been protected historically, but rather whether the Constitution protects a biological parent's right to maintain a relationship with his or her child.

This analytical error was noted by Justices O'Connor and Kennedy who, although concurring in the result, refused to endorse this analysis.<sup>154</sup> Justice O'Connor noted that footnote six of the plurality opinion sketched a mode of historical analysis used in identifying liberty interests protected by the fourteenth amendment's due process clause that she found possibly inconsistent with earlier decisions, including *Griswold v. Connecticut*<sup>155</sup> and *Eisenstadt v. Baird*.<sup>156</sup> She noted that there had been occasions when the Court had not used the "most specific level available," but instead had characterized relevant traditions protecting rights at levels of greater generality.<sup>157</sup> She concluded that she would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.<sup>158</sup>

In looking to the Court for recognition and protection for members of alternative families, the plurality's analysis, and even more its tone, are disheartening. Using *Michael H.* as a predictor for future court deci-

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<sup>152</sup> Cox, *supra* note 50, at 577.

<sup>153</sup> *Id.* at 576.

That fundamental choice is protected by the right to privacy, just as the choice whether to possess obscene materials in one's home, the choice whether to use contraceptives, the choice to marry interracially, and the choice to have an abortion, among others, are protected by the privacy right. Both Justice Blackmun and Justice Stevens in their *Bowers* dissents note this misconstruction of the constitutional question. . . . As Justice Blackmun concludes, 'we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.'

*Id.* at 576-577.

<sup>154</sup> See *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part) where those Justices note their refusal to join in the plurality's analysis contained in footnote 6.

<sup>155</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>156</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>157</sup> *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part)(citations omitted). For examples, she pointed to *Loving v. Virginia*, 388 U.S. 1 (1967); *Turner v. Safley*, 482 U.S. 78 (1987); *United States v. Stanley*, 483 U.S. 669, 709 (1987)(opinion concurring in part and dissenting in part).

<sup>158</sup> *Michael H.*, 491 U.S. at 132. She turned to Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961) to support her conclusion. *Id.*

sions, one would have to expect that the Court may conclude that the legal system is free to refuse to recognize and protect alternative families and nonlegal parents simply because they have never been legally recognized in the past. In previous times, when fewer of these families existed, such a "pinched conception" of the family may not have caused significant harm. But currently, with the large number of alternative families and the variety that exists among them, this willingness by the Court to avoid current realities by narrowly interpreting the due process clause is troubling at best.

In particular, the tone and analysis of the plurality decision does not bode well for expansion of constitutional protection of alternative families who do not fit this "pinched" definition of the family. Even if the plurality had simply refused to recognize Carole, Michael, and Victoria as a family,<sup>159</sup> its construction of liberty interests and its focus on tradition rejects any hope for constitutional protection of some alternative families. No one can argue that gay or lesbian families have been traditionally recognized in this society. And while the plurality did seem willing to recognize a "household of unmarried parents and their children" as a family,<sup>160</sup> that minor expansion to unmarried heterosexual couples, living together, with children born to those two biological parents, does nothing to protect gay, lesbian, or stepparent families. This lack of constitutional protection has been compounded by various state courts' refusals to provide statutory or equity-based protection to alternative families when given the opportunity to do so.

*B. Turning to State Courts for Equity-Based Protection of Nonlegal Parents in Alternative Families*

Given the lack of constitutional protection for alternative families and the fact that family law is considered to be a state law concern,<sup>161</sup> many alternative family members have turned to the state courts in attempts to obtain protection and recognition of their families. As the first section of this article established, the courts have numerous statutory and equitable bases available to them that could be used to provide this protection and recognition. Although the courts have shown some willingness to recognize parental bonds between stepparents and their children, alternative families that are not marriage-based have received virtually no protection from state courts.

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<sup>159</sup> *Michael H.*, 491 U.S. at 123 n.3.

<sup>160</sup> *Id.*

<sup>161</sup> *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

This section reviews recent decisions from the courts of New York, Wisconsin, and California that refused to use any of these avenues to protect the nonlegal parents and children of alternative families. Those cases are *In the Matter of Alison D. v. Virginia M.*,<sup>162</sup> *In re Interest of Z.J.H.*,<sup>163</sup> and *Nancy S. v. Michelle G.*<sup>164</sup> Close examination of each of these decisions establishes the legal maneuvers and analytical weakness employed by the courts to avoid a problem that faces them in increasing seriousness and numbers. Rather than using the options that are available to them, these courts have abdicated their responsibility to those families turning to the court system for assistance.

1. *In the Matter of Alison D. v. Virginia M.*

Perhaps the most surprising case of the three was the New York Court of Appeals decision in *In the Matter of Alison D. v. Virginia M.* which held that a lesbian co-parent did not have standing to seek visitation rights with the child that she and her partner shared.<sup>165</sup> The court, by narrowly interpreting the definition of parent in section 70,<sup>166</sup> held that Alison D. was not a parent within the statute capable of seeking visitation rights.

In that case, Alison D. and Virginia M. began their relationship in September 1977 and started living together in March 1978. Two years later, they decided to have a child together and agreed that Virginia would be artificially inseminated. As part of planning for their child, they agreed that they would share all rights and responsibilities for the child jointly.<sup>167</sup> In July 1981, their son was born and named A.D.M., with his middle name the same as Alison's last name and his last name the same as Virginia's.<sup>168</sup>

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<sup>162</sup> *In the Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

<sup>163</sup> *In re Interest of Z.J.H.*, 162 Wis. 2d 1002, 471 N.W.2d 202 (1991).

<sup>164</sup> *Nancy S. v. Michelle G.*, 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1st Dist. 1991).

<sup>165</sup> This decision was surprising because, just two years earlier, the same court in *Braschi v. Stahl Associates, Inc.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) defined "family" under the New York City Rent and Eviction Regulations, 9 N.Y.C.R.R. 2204.6(d) to include a family established by two gay men. The landlord was attempting to evict one of the men who had lived with his partner in their rent-controlled apartment for over 11 years after his partner, who was the only person on the lease, died of Acquired Immune Deficiency Syndrome (A.I.D.S.). Thus, because the statute allowed family members to remain in rent-controlled apartments after the death of the family member who signed the lease, he was allowed to retain the apartment.

<sup>166</sup> N.Y. Dom. Rel. § 70 (1988).

<sup>167</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

<sup>168</sup> *Id.*



For the next two years and four months, the two women raised A.D.M. jointly and shared the duties of caring for and raising him.<sup>169</sup> Alison and Virginia then ended their relationship. They established a visitation schedule with Alison seeing A.D.M. several times a week and continuing to pay one-half of the mortgage and other household expenses.<sup>170</sup> A.D.M. referred to both Virginia and Alison as "mommy."<sup>171</sup> Alison continued to visit A.D.M. until 1986, when Virginia bought out Alison's interest in the family home and began to restrict visitation.<sup>172</sup> At this time, A.D.M. was six years old. In 1987, Alison moved to Ireland for her career and tried to continue her relationship with her son but Virginia returned all her presents and letters.<sup>173</sup> At that point, Alison went to the legal system in an attempt to obtain continued visitation with her son. All three courts that heard the case decided against her.

In a one-page decision, the New York Court of Appeals interpreted the term "parent" in section 70 of the Domestic Relations Law to exclude Alison.<sup>174</sup> The Court focused on Alison's concession that she was not A.D.M.'s biological or adoptive parent and referred to her as "a biological stranger" to the child she helped raise for six years.<sup>175</sup> It rejected the claim that she was a "de facto" parent stating that it was insufficient to provide standing under the statute.<sup>176</sup>

The court's refusal to recognize Alison's relationship with A.D.M. and her status as a nonlegal parent was obvious from its choice of language in rejecting her claim. The court quoted *Ronald FF. v Cindy GG.*,<sup>177</sup> stating "[i]t has been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent

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<sup>169</sup> Id. According to the Appellate Division's opinion in this case, the two women shared the household and child support expenses before, during, and after the pregnancy. In the Matter of Alison D. v. Virginia M., 155 A.D.2d 11, 552 N.Y.S.2d 321 (2d Dep't 1990). Additionally, during the two years following A.D.M.'s birth, Alison assisted in his care, including transporting him to school and taking care of his medical needs. Id.

<sup>170</sup> *Alison D.*, 77 N.Y.2d at 655, 572 N.E.2d at 28, 569 N.Y.S.2d at 586.

<sup>171</sup> Id.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> The statute states that "either parent may apply to Supreme Court for a writ of habeas corpus to have such minor child brought before such court; and [the court] may award the natural guardianship, charge and custody of such child to either parent . . . as the case may require. . . ." N.Y. Dom. Rel. § 70 (1988).

<sup>175</sup> *Alison D.*, 77 N.Y.2d at 654, 572 N.E.2d at 28, 569 N.Y.S.2d at 58.

<sup>176</sup> Id. at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

<sup>177</sup> *Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 144, 511 N.E.2d 75, 77, 517 N.Y.S.2d 932, 933 (1987).

grievous cause or necessity."<sup>178</sup> It stated that "to allow the courts to award visitation . . . to a third person would necessarily impair the parents' right to custody and control" and concluded that Alison had "no right" to attempt to displace Virginia's choice of what was in the child's best interests.<sup>179</sup> Finally, the majority declined Alison's "invitation to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and wish to continue visitation with the child."<sup>180</sup>

Only once during the opinion did the majority pause to recognize the impact that its ruling may have on the countless children and nonlegal parents in A.D.M.'s and Alison's positions.

While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so.<sup>181</sup>

While conceding that visitation may be in the best interests of a given child, it refused to interpret the controlling statute to protect that interest.

The dissent focused on this refusal. Visitation and custody matters are predicated in most states on achieving the best interests of the child involved.<sup>182</sup> The dissent pointed out that the court of appeals itself had declared that this standard should be controlling.

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<sup>178</sup> *Alison D.*, 77 N.Y.2d at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588 (emphasis added). The court uses this custody case to deny visitation rights to Alison D. by stating that allowing the courts to award visitation, which is "a limited form of custody," to a third person would impair the parents' right to custody and control. The dissent noted that the majority incorrectly ignored the "significant distinction between visitation and custody proceedings." *Id.* at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (Kaye, J., dissenting). It noted that custody disputes implicate a parent's right to rear a child and must be based on lack of fitness of the custodial parent. The majority used a custody case to brush away Alison's visitation request and the custody standard (Alison's concession that Virginia is not unfit) to deny her case. *Id.* at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588. The dissent noted that any concern about parental fitness is irrelevant in visitation proceedings. *Id.* at 661, 569 N.E.2d at 32, N.Y.S.2d at 591. It pointed out that the majority's application of the "extraordinary circumstances" test in *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976) to a visitation case "closes the door on all consideration of the child's best interest in visitation proceedings . . . unless the petitioner is a biological parent." *Alison D.*, 77 N.Y.2d at 661, 569 N.E.2d at 32, N.Y.S.2d at 591.

<sup>179</sup> *Alison D.*, 77 N.Y.2d at 656-657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588 (emphasis added).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> At least half of the states have statutes incorporating this standard. H. Clark, Jr., § 19.4 *The Law of Domestic Relations in the United States* 797 (2d ed. 1988). Nearly all judicial

As the court wrote in *Matter of Bennett v. Jeffreys*, even in recognizing the superior right of a biological parent to the custody of her child, "when there is a conflict, *the best interest of the child has always been regarded as superior to the right of parental custody*. . . . This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest."<sup>183</sup>

In refusing to allow this standard to guide its decision, the majority "turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children. . . ."<sup>184</sup>

The dissent argued that the court was empowered to define parent in a way that would focus on the best interests of the child in these cases and should have taken this opportunity to do so. It noted that "it is surely within our competence to do so" given the statute's objectives, the court's power, and the fact that the majority's decision "absolutely" forecloses considering the child's best interests.<sup>185</sup>

Although the dissent did not include a definition of "parent" that would satisfy the mandate of recognizing the child's best interests, it pointed to factors that would be important. "It should be required that the relationship with the child came into being with the consent of the biological or legal parent, and that the petitioner at least have had joint custody of the child for a significant period of time."<sup>186</sup> The dissent relied on the court's decision in *Braschi v. Stahl Associates*, which defined "family" under rent-control statutes, to support its belief that other factors could be added to those listed above to protect all relevant interests involved in these proceedings.

In fact, it was the decision in *Braschi* which had led activists for alternative families to believe that the New York Court of Appeals might have been the first state supreme court to recognize the bonds between children and nonlegal parents living in alternative families. *Braschi* had shown the court's willingness to step beyond a traditional, narrow interpretation of undefined statutory terms such as "family" or "parent." The dissent in the appellate division best explained why the majority was incorrect in narrowly defining "parent," given the precedent set in *Braschi*.

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discussions of custody cases begin with the statement that custody should be awarded to promote the child's best interests. *Id.* at § 19.1.

<sup>183</sup> *Alison D.*, 77 N.Y.2d at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (emphasis added).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 662, 572 N.E.2d at 32, 569 N.Y.S.2d at 591.

<sup>186</sup> *Id.*

The majority's holding to the contrary rests upon a narrow application of the term "parent" which is inconsistent with relevant holdings of other jurisdictions and with the *progressive and realistic* definition of the term "family" recently adopted by the Court of Appeals in *Braschi v. Stahl Associates*. . . . The governing criterion, as always, is the best interests of the child. Accordingly, in construing the statutory term "parent", the court must strive to avoid rigid analysis and temper its inquiry by considering the best interests of the child under the circumstances presented.<sup>187</sup>

It then turned to the language of *Braschi* which one would have presumed would have been instructive in deciding *Alison D.*

The decision in *Braschi* centered on the court of appeals' interpretation of the term "family" as it was used in the New York City rent and eviction regulations.<sup>188</sup> The court noted that statutes should be interpreted to avoid "objectionable consequences and to prevent hardship or injustice" and that when two constructions are possible, "the consequences that may result from the different interpretations should be considered."<sup>189</sup> Despite an argument by the landlord that the term "family" should be defined only to include "traditional, legally recognized familial relationships,"<sup>190</sup> the court refused to "rigidly" restrict the definition of family to those people who formalized their relationship by obtaining a marriage certificate or adoption order.<sup>191</sup> In language that the *Alison D.* court could easily have used in deciding that case, the court looked beyond legally defined relationships with a realistic eye.

The intended protection against sudden eviction should not rest on *fictitious legal distinctions or genetic history*, but instead should find its foundation in the reality of family life. In the context of eviction, *a more realistic, and certainly equally valid, view* of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. *This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.*<sup>192</sup>

<sup>187</sup> *Alison D.*, 155 A.D.2d 11, 16-17, 552 N.Y.S.2d 321, 325 (2d Dep't 1990)(emphasis added).

<sup>188</sup> 9 N.Y.C.R.R. 2204.6(d). The statute states that when a rent-control tenant dies, the landlord may not evict "the surviving spouse . . . or some other member of the deceased tenant's family who has been living with the tenant."

<sup>189</sup> *Braschi v. Stahl Associates*, 74 N.Y.2d 201, 208, 543 N.E.2d 49, 51-52, 544 N.Y.S.2d 784, 786-787 (1989).

<sup>190</sup> *Id.* at 209, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

<sup>191</sup> *Id.* at 211, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

<sup>192</sup> *Id.* (emphasis added).

The court concluded that when the legislature used the term "family," it intended to extend protection to those in households having "all of the normal familial characteristics" and thus, Braschi should be given the opportunity to establish that he and his partner lived in such a household.<sup>193</sup>

The court's amnesia less than two years after its decision in *Braschi* is hard to comprehend. The court indicated that statutory interpretation left room to acknowledge the realistic situation of alternative families in housing matters. Surely that room also exists within parent-child relationships. Indeed, with the additional concern of protecting the best interests of the child, it is hard to understand how the court could define parent so narrowly. While there are potential difficulties in preventing too broad an expansion of adults seeking visitation rights, the court could easily use any of the equitable doctrines or the standards asserted by Polikoff or Bartlett to resolve this concern. The fear of drawing distinctions based on factual considerations should not keep the courts from using their judicial powers to protect the children and nonlegal parents of alternative families.<sup>194</sup>

## 2. In re Interest of Z.J.H.

The Wisconsin Supreme Court followed the lead of the New York Court of Appeals. The court rejected Wendy Sporleder's request for standing to seek custody or visitation of Z.J.H. and held that the co-parenting agreement signed between her and her partner, Janice Hermes, was unenforceable.

Wendy and Janice lived together as "companions"<sup>195</sup> for eight years. Wendy tried to become pregnant through artificial insemination but was unsuccessful. They then agreed that Janice would adopt a child. In March 1988, Z.J.H., two months old at that time, was placed in their home by an adoption agency. Wendy provided primary care for Z.J.H.

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<sup>193</sup> *Id.*

<sup>194</sup> One argument that can be made for restricting the definition of "parent" is that it encourages people in alternative families to pursue traditional family relationships with their children through marriage and adoption. While this is an option for heterosexual couples, lesbians and gay men have been precluded from marrying or adopting children jointly and thus their conduct will not be changed by such a restrictive definition. See also, *infra* note 301 for discussion of marriage laws and the lesbian and gay community.

<sup>195</sup> In *Z.J.H.*, the women lived together as partners for eight years but the court simply refers to them as companions. The court's use of this term denies the existence of their family relationship and foreshadows its conclusion several pages later; without understanding that they had a family relationship, it was impossible for the court to recognize that they were co-parents of Z.J.H.

while Janice worked outside the home. On October 25, 1988, they entered into a co-parenting agreement in which they agreed that they would decide any custody issues involving their son by using mediation and that the non-custodial parent would have "reasonable and liberal visitation rights" to their child. During that month, Wendy and Janice separated. Janice adopted Z.J.H. in November and, within a few months, prevented Wendy from having contact with him.

Wendy brought an action in family court seeking visitation or custody rights and enforcement of the co-parenting agreement. The trial court granted summary judgment to Janice which was upheld by both the court of appeals and the supreme court. The supreme court addressed four issues: (a) whether Wendy had standing to obtain custody or physical placement of Z.J.H. under the doctrine of "in loco parentis", (b) whether section 767.245(1), Stats., entitled Wendy to visitation, (c) whether the co-parenting agreement between Wendy and Janice was enforceable, and (d) whether Janice was equitably estopped from denying that Wendy was an equitable parent and thus entitled to custody or visitation of Z.J.H. The court found against Wendy and in favor of Janice on all four issues.

*(a) Standing to Obtain Custody Under in Loco Parentis*

The court rejected Wendy's claim for standing by a series of successive steps that caught Wendy in a legal maze. First, it determined that a "non-parent" could not bring an action to obtain custody of a minor child unless the natural parents were unfit or unable to care for the child or compelling reasons existed for awarding custody to a third person.<sup>196</sup> Because Wendy conceded that Janice was neither unfit nor unable to care for their son, the court turned to whether she had alleged "compelling circumstances" that would justify providing custody to her.<sup>197</sup> Denying Wendy's argument that the trial court's grant of summary judgment prevented her from establishing facts showing "compelling circumstances," the court rejected her claim. While acknowledging that Wendy had a "parent-like" relationship with her son, the court found that since no defect existed in Z.J.H.'s relationship with Janice, Wendy had no standing to claim custody of the child.

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<sup>196</sup> In re Interest of Z.J.H. v. Hermes, 162 Wis. 2d 1002, 1009, 471 N.W.2d 202, 205 (1991). In proceeding through this discussion, the court "sets aside" the question of Wendy's status as a parent and considers whether she has stated "compelling reasons" sufficient to provide custody to her. Id. The simple fact that the court deems Wendy's parental status as something that can be "set aside" foreshadows that result the court will reach.

<sup>197</sup> Id. at 1010-1011, 471 N.W.2d at 205.

Second, the court addressed whether Wendy was a parent entitled to be considered for custody, like Z.J.H.'s adoptive parent, Janice, and refused to grant her parental status. The court tried to distance itself from its earlier decision in *In re Custody of D.M.M.*<sup>198</sup> In that case, the court had left the term "parent" undefined after finding that an aunt did have standing to seek custody because the legislature could not have intended to supplant the common law by restricting the definition of parent so drastically.<sup>199</sup> In *Z.J.H.*, the court said that the language in *D.M.M.*, which had indicated that the "ambiguous" term "parent" in the visitation statute could include a person standing in loco parentis, was merely dicta.<sup>200</sup>

Third, having distinguished *D.M.M.*, the *Z.J.H.* court stated that it had never provided someone standing under "in loco parentis" to bring a custody action because of the state's "parental preference" standard.<sup>201</sup> This standard provides "great deference" to the rights of *parents* to raise their children and, while recognizing the rights of children, *assumes* that it is in the best interest of the child to be raised by his or her natural parent.<sup>202</sup>

The court does not skip a beat in rejecting Wendy's argument that she is Z.J.H.'s parent and thus entitled to this "great deference" to raise her child without state interference. The court's use of this standard to prevent her from pursuing custody rights to her son requires circular reasoning. Wendy cannot obtain custody as a nonlegal parent because parents are given deference in raising their children; she cannot be a parent because she has no legal relationship with Z.J.H. She has no legal relationship with Z.J.H. because the court refused to interpret the undefined term "parent" to include her; therefore, she was not entitled to any "parental deference" to continue her relationship with her son.

The court also considered the legislative history of the custody and visitation statutes. The court noted that section 767.24(3)(a) was amended in 1987 to refer to "parent" rather than "party" in custody disputes.<sup>203</sup> Section 767.245(4) was also renumbered to section

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<sup>198</sup> *In re Custody of D.M.M. v. J.M.*, 137 Wis. 2d 375, 404 N.W.2d 530 (1987). In that case, a dispute arose between the child's aunt who had been appointed guardian and her mother over custody. The court was interpreting Wis. Stats. § 767.245(4) (1985-1986) which stated that visitation could be granted to parents, grandparents and great grandparents.

<sup>199</sup> *Z.J.H.*, 162 Wis. 2d at 1014, 471 N.W.2d at 207.

<sup>200</sup> *Id.* The court also noted that it held that the statute could be alternatively defined to include natural parents only. *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1016, 471 N.W.2d at 208. Section 767.24(3)(a) had been section 767.24(1)(c) (1985).

767.245(1) and amended to include “‘a person who has maintained a relationship similar to a parent-child relationship with the child’ as persons who may petition for visitation rights.”<sup>204</sup> In considering the different language in these statutes, the court stated that the legislature did not intend to preclude these persons from obtaining visitation rights, but must have intended to preclude them from obtaining custody rights or it would have amended the custody statute similarly.<sup>205</sup>

This interpretation of the statute is logical, but it ignores the fact that when the legislature amended section (3)(a) to include the term “parent” instead of “party”,<sup>206</sup> it also could have amended the rest of the statute to refer to “parent” instead of “party.” But it chose not to do so. Thus, under section 767.24(2)(b), after finding that joint custody would be in a child’s best interest, the court may give joint custody to both “parties.” It seems, therefore, just as likely that the legislature was willing to leave open the possibility that one of the “parties” obtaining joint custody would not be a “parent.” Otherwise, it would have changed the language in the entire statute to refer only to parents. The majority seems to be using legislative history analysis to support the conclusion it wishes to reach while not considering how the legislative history supports the other result as well.

Before deciding whether to provide Wendy with visitation (having just determined that the legislature did not “intend to preclude such persons from visitation rights”<sup>207</sup>), the majority explained its policy reason for denying custody rights to people standing in loco parentis. The court was concerned that providing standing to people like Wendy would

open the doors to multiple parties claiming custody of children by virtue of their in loco parentis status. *Without limitations as we have discussed today, a child could have MULTIPLE “PARENTS” and could find himself or herself subject to multiple custody and visitation arrangements. . . . It would be virtually impossible to ensure equity to all parties and protect the best interests of the child under such a scenario.*<sup>208</sup>

This reasoning ignores the reality that children like Z.J.H. do, in fact, have “multiple parents.” Refusing to recognize this does not alter this

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Wis. Stats. § 767.24(3)(a) concerns transferring custody of a child to a relative, county department, or child welfare agency when the court finds that neither *parent* is fit and proper to have care and custody of the child. The amended language substituted “parent” for “party” in this section referring to the termination of parental rights.

<sup>207</sup> *Z.J.H.*, 162 Wis. at 1016, 471 N.W.2d at 208.

<sup>208</sup> *Id.* at 1017-1018, 471 N.W.2d at 208-209.



reality. Janice adopted Z.J.H. into a family consisting of herself, Wendy, and their child. Like numerous other children, Z.J.H. was brought into a nuclear family with two parents. This family atmosphere was no different than that of the "normal" nuclear family.<sup>209</sup> A legal parent will not have countless family relationships throughout his or her child's life, and thus only a few individuals, at most, will be able to embrace parent-like relationships with the legal parent's child.<sup>210</sup>

For the court to envision hundreds of "parents" clamoring for the courtyard steps seeking custody of Z.J.H. is pure fantasy. If the court were to adopt one of the standards suggested by Polikoff or Bartlett or any of the equitable theories, it could establish clear limitations on those adults who potentially could claim custody rights. That standard would protect both the legal parents and those standing in loco parentis. Legal parents would know that by fostering a "parent-like" relationship between an adult and their child that they would risk having to share custody or visitation with that adult. They could choose to foster such a relationship or not based on their legal status as the child's parent.

Additionally, the nonlegal parent would be able to clarify with the legal parent what his or her status would be in the future and establish some guidelines for entering into a relationship with the legal parent's child. This same result also occurs by way of the court's decision. Nonlegal parents in alternative families have been told that they will not be recognized as important adults in their partner's children's lives. This result violates the "best interests of the child" standard because it prevents all children living in alternative families from maintaining a long-standing relationship with their nonlegal parent. The court has told these nonlegal parents not to enter into any kind of loving, parenting relationship with these children because they will receive no protection of that relationship. This kind of legally mandated *lack of relationship* surely cannot be in these children's best interests. And while many would condemn the nonlegal parent who acts in such a loveless way toward his or her partner's children, blame surely cannot be laid at their feet. The court in its decision established this scenario and remains responsible for the harm that results from it.

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<sup>209</sup> There is no difference unless one is concerned that the adults are in a same-sex relationship. But for a child the age of Z.J.H. there is no difference for him except that he was receiving the love of two parents, rather than simply the love of the one legal parent he had.

<sup>210</sup> The court also seems to be ignoring the reality of numerous marriages and divorces that exist in this country today. Thus, children from traditional nuclear families will also frequently have "multiple" parents.

The court remained fixated on its concern of countless individuals attempting to bring claims for parental status while brushing aside the impact that its decision will have on the numerous children living in alternative families.

The California Court of Appeals appropriately stated: "We do not, however, agree that the only way to avoid such an *unfortunate situation* [the suffering a child such as Z.J.H. may endure as a result of his separation from Wendy] is for the courts to adopt appellant's novel theory by which a nonparent can acquire the rights of a parent, and then face years of unraveling the complex practical, social and constitutional ramifications of this expansion of the definition of parent." While our decision today may result in *occasional unfortunate consequences* for minor children who have developed relationships with individuals claiming standing under the doctrine of in loco parentis, the legislature *deliberately spared the legal system* from an obligation to discern a just result from among the myriad of circumstances in which individuals could claim rights under the in loco parentis doctrine.<sup>211</sup>

It would be difficult to find a paragraph in a court opinion that is more heartless or misfocused than this one. First, the court, in its strongest recognition of the children affected by its decision, merely referred to the "unfortunate" situation and consequences that will result. To label the loss of a parent for a minor child as an "unfortunate" situation shows an appalling lack of conscience from the highest court of Wisconsin. Second, the court added insult to injury by, in the same breath, noting that the "legal system" has been *spared* the obligation of achieving a "just" result in these cases. One finds it hard to feel much sympathy for a legal system which ignores the reality of the children and nonlegal parents looking to it for help in solving their extremely emotional problems and instead sighs a breath of relief because it has been able to avoid the inconvenient hassle of solving this problem.

(b) *Statutory Visitation Rights*

Having denied Wendy standing to raise her custody claim, the court then refused to provide visitation rights to her. It reached this result even though, just a few pages earlier, it expressly recognized the legislature's intent to expand the people eligible to seek visitation by amending the controlling statute, Wis. Stat. sec. 767.245(1), to include a "person who has maintained a relationship similar to a parent-child

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<sup>211</sup> Id. at 1018 (quoting *Nancy S.*, 228 Cal. App. 3d at 841, 279 Cal. Rptr. at 219).

relationship with the child.”<sup>212</sup> This result is particularly anomalous because the legislature made the following finding when enacting 1987 Wis. Act 355:

In its study, the special committee on custody arrangements concluded that the current laws and practices relating to child custody determinations in divorce and other actions affecting the family:

5. Fail to recognize the importance to the child of continuing contact with stepparents and persons with whom the child has lived in a relationship similar to a parent-child relationship.<sup>213</sup>

Given the clear legislative intent to broaden the definition of those eligible to petition for visitation, the court had to turn to prior case law to reject Wendy’s claim. Although the legislature gave it the clear opportunity to do justice between the legal parent, the nonlegal parent, and the child in these cases, the court refused to do so.

The court held that, while a *third party* was not precluded<sup>214</sup> from bringing an action to establish visitation rights, “a review of our *case law* leads to the inescapable conclusion that there must be an underlying action affecting the family unit before the provisions of sec. 767.245(1) are implicated.”<sup>215</sup> Only in cases affecting the family unit, such as divorce, custody, or CHIPS<sup>216</sup> actions, can a visitation action be brought “against parental wishes.”<sup>217</sup>

The court turned to the court of appeals decision in *Van Cleve v. Hemminger*,<sup>218</sup> to reject the claim that a visitation action could be brought beyond these limited contexts. In *Van Cleve*, the court of appeals stated that the legislature did not intend for the state to intervene in the parents’ decision regarding their children’s best interests “when *the family unit is intact*.”<sup>219</sup> Thus, the court concluded:

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<sup>212</sup> Id. at 1016, 471 N.W.2d at 208.

<sup>213</sup> Act of April 22, 1988, 1987 Wis. Laws 1259, 1260.

<sup>214</sup> This is the court’s language. *Z.J.H.* 162 Wis. 2d at 1020, 471 N.W.2d at 209. Two pages earlier, the court had based its rejection of Wendy’s claim to custody of Z.J.H. on the fact that the legislature had only amended the visitation statute to recognize parent-like relationships, not the custody statute. Once it begins to consider whether it should follow the clear language of that statute to provide visitation rights to Wendy, it conveniently finds no such clear intent. It merely indicates that the legislature did not *preclude* such actions by third parties, even though the legislature specifically amended the statute to recognize them.

<sup>215</sup> Id. at 1020, 471 N.W.2d at 209.

<sup>216</sup> Child in need of protection and services.

<sup>217</sup> 162 Wis. 2d at 1020, 471 N.W.2d at 209-210.

<sup>218</sup> 141 Wis. 2d 543, 415 N.W.2d 571 (Ct. App. 1987).

<sup>219</sup> 162 Wis. 2d at 1022, 471 N.W.2d at 210. The court noted that if the legislature had disagreed with this interpretation of the visitation statute by the *Van Cleve* court, it would have

The rationale behind these cases was that the legislature did not intend to override a parent's determination of visitation unless an underlying action affecting the family unit had been filed, because in such an instance, *ordering visitation with non-parents may help to mitigate the trauma of a dissolving relationship*. The presence of *an intact family unit* merely signals the absence of a dissolving family relationship.<sup>220</sup>

By finding that Janice and Z.J.H. were an intact family unit and there was no underlying action affecting that family unit in this case, it had "no authority" to allow Wendy to petition for visitation rights.<sup>221</sup> While the legislature did include stepparents and parent-like individuals in the group of people who could qualify for visitation rights, the court found no intent to grant them visitation rights in an intact family.

This interpretation is unfair to people in Wendy's situation. No state in the country allows gay men or lesbians to marry, so Wendy cannot bring a divorce action based on that marriage.<sup>222</sup> Wendy has been denied, in this case, the right to bring a custody action for Z.J.H. Wendy has conceded her ex-partner's fitness to care for their son and thus cannot bring a CHIPS action. Using case law (which it has the power to alter) and a narrow definition of what constitutes "an intact family unit," the court precluded Wendy and others in her situation from maintaining a relationship with their children when their families dissolve.

The court did not recognize, in any way, that Janice, Wendy, and Z.J.H. had a family relationship that had dissolved. The court simply considered the legal relationships, found that the child and his legal parent were still living as a family, and excised Wendy from the family. No acknowledgement was made that a dissolving family relationship was involved in this case, because it was not a family that the courts recognize. Due to its alternative nature and its exclusion from legal recognition, the court refused to help "mitigate the trauma" of the dissolving relationship for both the nonlegal parent and the child. It put on blinders, took a myopic view of the family, saw that it remained intact, and moved on.

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amended the visitation statute when it made the changes in the 1987 Act. *Id.* at 1023, 471 N.W.2d at 211. For a response to this assertion, see *infra* notes 226 to 229 and accompanying text.

<sup>220</sup> *Id.* at 1022, 471 N.W.2d at 210 (emphasis added)(citations omitted).

<sup>221</sup> *Id.*

<sup>222</sup> Colker, *supra* note 17, at 321.

Justice Bablitch focused his dissent on this myopia.

*Everyone agrees that children of a dissolving traditional relationship deserve and need the protection of the courts.* Yet the majority holds that children of a dissolving non-traditional relationship are not entitled to the same protection. What logic compels that result? The legislature could not have intended such an absurd and cruel result, but that is what the majority of this court has determined.

Media accounts, and the majority opinion, focus solely on the rights of the adults in this non-traditional relationship that is dissolving. Lost in the media accounts, and in the majority opinion, are the interests of at least equal if not paramount concern: the interests of the child.

What about the child, Z.J.H.? Who speaks for him? What is in his interest? The majority denies him any legal significance. He is a nonentity in this battle between two parents. Because this is a non-traditional parent relationship, the result of the majority's opinion is that the child's interests will not even be considered. It is as if he does not even exist.

But the child does exist. And thousands of others like him do exist. These children need, and deserve, the protection of the court as much as children of a dissolving traditional relationship. Their interests at least ought to be considered.<sup>223</sup>

Bablitch continued by attacking the majority's legal premise. He agreed with its reliance on *Van Cleve*, which he called a well-reasoned opinion and involved children of a traditional relationship.<sup>224</sup> But he noted that its underlying rationale was "that children of a dissolving relationship need and deserve the protection of the court lest they become mere pawns in the conflict between the parents."<sup>225</sup> While recognizing the majority's concern with this when it relates to traditional family relationships, he wondered about the lack of an equal concern for the children of dissolving non-traditional relationships.<sup>226</sup> He concluded that the legislature could not have intended such a result, given its 1987 amendments to the visitation statutes.<sup>227</sup> He interpreted those amendments to show a legislative intent that the Wisconsin courts consider whether visitation is in the best interests of the child when the adult has been involved in a relationship with the parent, that relationship has dissolved, and the adult established a parent-child like rela-

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<sup>223</sup> 162 Wis. 2d at 1032, 471 N.W.2d at 214-215.

<sup>224</sup> *Id.* at 1032, 471 N.W.2d at 215.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

tionship with the child.<sup>228</sup> He concluded that the majority has rewritten the visitation statute to include an exception where none existed.<sup>229</sup>

Bablitch noted that the facts in this case perhaps were not sufficiently sympathetic to achieve the majority's concern. He noted that the child was in Wendy and Janice's home for seven months. Janice did not adopt the child until after they had separated. The agreement was entered into after they had separated.<sup>230</sup> Bablitch wondered if different facts would have achieved a different result.<sup>231</sup> He refused to view this case as a basis for what the court will hold in future cases involving children of non-traditional relationships.<sup>232</sup>

Thus even Bablitch also shows some lack of understanding for the problem that Z.J.H. and Wendy face. While Z.J.H. and Wendy did not have a great deal of time to establish their relationship, no member of the court denies that they had established a parent-child "like" relationship. While Wendy may not have spent years with her son, those months were obviously extremely important to her as can be seen by her willingness to pursue her case to the state's highest court. Wendy became a parent when Z.J.H. entered her family. The Wisconsin Supreme Court took that away from her.

*(c) Parenting Contract Unenforceable*

The next issue the court discussed was whether the parties' co-parenting agreement was enforceable. The court held that rights to custody and visitation are controlled by statutory and case law and cannot be contracted away.<sup>233</sup> Therefore, the contract must be void to the extent it attempted to provide custody and visitation rights to Wendy.<sup>234</sup> The court also focused on the "societal and constitutional interests in maintaining the relationship between a natural or adoptive parent and that parent's child" as a basis for voiding contractual provisions that would affect that relationship.<sup>235</sup>

But the court focused on the public interest in protecting *both* the rights of the natural or adoptive parent and "of the family unit as well"<sup>236</sup> thereby continuing its blindness to the fact that the family unit

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<sup>228</sup> Id.

<sup>229</sup> Id.

<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> Id.

<sup>233</sup> Id. at 1023-1024, 471 N.W.2d at 211.

<sup>234</sup> Id.

<sup>235</sup> Id.

<sup>236</sup> Id.

involved in this case consisted of Z.J.H. and his *two* mothers, Janice and Wendy. If a public interest exists in protecting the family unit, then Wendy should have had a policy claim for having her contractual agreement upheld.

Justice Abrahamson, dissenting from the majority's decision, focused on the enforceability of the contract between Wendy and Janice.<sup>237</sup> She argued that the majority's "all-encompassing, broad language" that contracts affecting visitation and the parent-child relationship were against public policy "cannot be correct."<sup>238</sup> While recognizing that state statutes do govern visitation and support of children "*under certain circumstances*," they do not bar parents from entering into agreements on physical placement, care, and financial support of a child when intended to protect the best interests of that child.<sup>239</sup>

Abrahamson focused on Wisconsin's history of protecting the freedom of contract and the test that should have been used to determine whether a contract is unenforceable for violating public policy.<sup>240</sup> In a showing of distaste for the majority's decision, she pointed out that this test "prevents courts from refusing to enforce agreements on the basis of a court's amorphous notions of public good."<sup>241</sup> The majority's result was incorrect because it did not balance the policies favoring enforcement against those disfavoring enforcement.<sup>242</sup>

Abrahamson noted that "the best interest of the child" is the dominant public policy in family matters and circumstances relating to the policy that may exist, under the facts of this case, that would warrant granting visitation rights under the agreement.<sup>243</sup> Due to the case's summary judgment status, Abrahamson concluded that it should have been remanded for a hearing.<sup>244</sup> She would have had the district court specifically consider "such public policies as protection of freedom of contract, protection against impairment of family relations, and the

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<sup>237</sup> Id. at 1028-1029, 471 N.W.2d at 213.

<sup>238</sup> Id.

<sup>239</sup> Id. (emphasis added).

<sup>240</sup> Id. She noted that the court must (1) define precisely the relevant public policy and its source, (2) determine whether there is a conflict between that policy and the contract, and (3) determine what remedy would best further the public interest.

<sup>241</sup> Id.

<sup>242</sup> Id. at 1029, 471 N.W.2d at 213.

<sup>243</sup> Id. at 1029, 471 N.W.2d at 213-214. She pointed to section 191 of the Restatement (Second) of Contracts which states that agreements affecting a minor's custody are unenforceable "*unless* the disposition as to custody is consistent with the best interests of the child." Id.

<sup>244</sup> Id.

best interests of the child in determining whether any part of the agreement affecting the child should be enforced.”<sup>245</sup>

(d) *Equitable Remedies*

The final issue addressed by the majority was its refusal to equitably estop Janice from denying that Wendy was Z.J.H.’s equitable parent. The court brushed aside this argument by stating that statutory limitations cannot be avoided by estoppel.<sup>246</sup> What the court’s discussion ignored is that equitable remedies are always invoked when legal remedies are unsatisfactory.<sup>247</sup> Thus, to answer a request for an equitable remedy with a claim that legal remedies control the situation is to beg the question presented.<sup>248</sup>

The court attempted to distinguish this case from *In re Paternity of D.L.H.*,<sup>249</sup> but was not convincing. In *D.L.H.*, the husband of a woman sued to establish a right to continue his relationship with his stepchild. The court of appeals concluded that the husband could use the status of “equitable parent” to equitably estop his wife from instituting a paternity suit against him.<sup>250</sup> In this case, the majority attempted to draw a distinction between the two cases by noting that, in *D.L.H.*, the husband was using equitable estoppel as a shield to protect his right to a relationship with the child while Wendy was using equitable estoppel to achieve custody against an adoptive parent.<sup>251</sup> This distinction is simply untenable. Wendy was using estoppel defensively to protect her right to a relationship with Z.J.H., just as the husband did in *D.L.H.* In both cases, the nonlegal parent attempted to estop the legal parent from denying that a parental relationship existed between the nonlegal parent and the child.

The Wisconsin Supreme Court considered every issue raised by Wendy and rejected each of them. Its legal maneuvers and myopic view of the family indicate a refusal to recognize the difficult societal problem facing it. Refusing to recognize alternative families is one way

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1025, 471 N.W.2d at 212.

<sup>247</sup> Laycock, *Injunctions and the Irreparable Injury Rule*, 57 Tex. L. Rev. 1065, 1071-1072 (1979).

<sup>248</sup> Plaintiffs are entitled to the most complete, practical, and efficient remedy and equitable remedies become available when there is no adequate remedy at law. *Id.*

<sup>249</sup> 142 Wis. 2d 606, 419 N.W.2d 283 (Ct. App. 1987).

<sup>250</sup> *D.L.H.*, 142 Wis. 2d at 617, 419 N.W.2d at 287. In that case, the wife brought the paternity action to establish that her husband was not the child’s biological father and, thus, was not entitled to continue his parental relationship after the parties obtained a divorce.

<sup>251</sup> *Z.J.H.*, 162 Wis. 2d at 1029, 471 N.W.2d at 213-214.



to resolve that problem; but that refusal does nothing to resolve the problem that will continue to exist for the countless nonlegal parents and children of alternative families who expected more from the state's highest court.

3. Nancy S. v. Michele G.

The California Court of Appeals for the First District reached the same result as the courts from New York and Wisconsin. In the first reported decision on this topic, the California court rejected all the possible equitable theories available to it in rejecting the nonlegal parent's claim for custody or visitation of her two children.

Michele and Nancy, a lesbian couple, lived together for sixteen years and had two children together. The women began living together in 1969 and, in November of that year, had a private marriage ceremony. Later they decided to have children by artificially inseminating Nancy. Nancy is the biological mother of both children, a daughter born in 1980 and a son born in 1984. Both children have Michele's last name as their middle name, and Michele was listed on both children's birth certificate in the place reserved for the father's name. Both children called both of their mothers "mom." In 1985, the women separated. Their daughter, who was five at that time, continued to live with Michele and their son, who was one, lived with Nancy. A custody arrangement allowed the two children to be together four days a week. This arrangement continued for three years. Then Nancy wanted to change the custody arrangement so that each of them had custody of both children fifty percent of the time. Michele opposed this change and attempts to mediate the dispute failed.

Nancy brought an action under the Uniform Parentage Act seeking a declaration that she was entitled to sole legal and physical custody, that Michele was not the parent of either child, and that Michele could obtain visitation only as permitted by Nancy. The trial court granted temporary custody to Nancy. In answering the complaint, Michele admitted that she was not the biological mother of either child but denied Nancy's allegations that she was not their parent. She also requested custody and visitation in accordance with their original agreement. The trial court rejected Michele's arguments that she was a parent under the Uniform Parentage Act or that she had the status of *de facto* parent which entitled her to custody or visitation. The trial court granted sole physical and legal custody to Nancy. It determined that even if Michele could prove that she was a *de facto* parent to the children, it could not award custody to her over Nancy's objections

because Nancy was the natural mother and qualified as a parent under the act. Therefore, it awarded sole physical and legal custody to Nancy.

The California Court of Appeals began its analysis by interpreting the Uniform Parentage Act. That Act defines parent as one who is the natural or adoptive parent of a child.<sup>252</sup> The court noted that Michele did not dispute that she was not the natural mother of either child nor that she had not adopted either child. The court also concluded that the children were not born into a legally recognized marriage which would, arguably, have permitted Michele to be recognized as a parent under the Act.<sup>253</sup> Although Michele was not a parent as defined by the Act, she argued that her long-term relationship with the children entitled her to seek custody and visitation with them as though the dispute had arisen between two legally recognized parents. The court acknowledged that, although she had not proven her allegations regarding her relationship with the children, the record would support her allegations that, since their birth, she had "performed the role of a loving mother."<sup>254</sup>

The court of appeals considered most of the available equitable theories that would have entitled Michele to parental status. In language remarkably similar to the Wisconsin Supreme Court's, the court rejected Michele's arguments that she stood in loco parentis to her children<sup>255</sup> or that Nancy should be equitably estopped from asserting that

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<sup>252</sup> Cal. Civ. Code § 7001.

<sup>253</sup> This analysis by the court raises the numerous issues, discussed at note 301, *infra*, on whether gay men and lesbians should be allowed to marry. The court notes that the Act creates a presumption that a man is the natural father if (1) he meets the conditions imposed under section 621 of the Evidence Code (discussed *supra* notes 104-105, concerning *Michael H.*), (2) the child is born during a valid marriage or one that apparently complies with the law, (3) after the child is born, he and the child's mother marry or attempt to marry and he engages in conduct by which he holds the child out as his own, such as putting his name on the birth certificate, or (4) he is the husband of woman who bears a child through artificial insemination. *Nancy S.*, 228 Cal. App. 3d at 836 n.3, 279 Cal. Rptr. at 215 n. 13. If Nancy and Michele's "private" marriage ceremony in November 1969 was recognized by the legal system, there is no question that Michele would have to be recognized as her children's parent under the Uniform Parentage Act. Although it is sex-specific in referring to a man and husband, if their marriage were valid, Michele would meet each of the four scenarios under the Act which would presume her parenthood.

<sup>254</sup> *Nancy S.*, 228 Cal. App. 3d at 836 n.4, 279 Cal. Rptr. at 216 n.4. It is interesting to note that the court, while acknowledging Michele's role in the children's lives, cannot bring itself to call her their mother. Instead, it simply notes that she performed that "role."

<sup>255</sup> The court acknowledged that the doctrine of in loco parentis had been used in the context of torts cases to impose the same rights and obligations on those standing in loco parentis as those imposed on parents by statutory and common law. *Id.* at 838, 279 Cal. Rptr. at 217. The court noted that it has also been used to confer benefits on the child, such as favorable inheritance tax treatment or workers' compensation benefits. But it found that the doctrine had never been applied in a custody dispute to give a "nonparent" the same rights as

Michele was not the parent of their children.<sup>256</sup> The court then considered three other possible avenues for Michele to achieve parental sta-

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a parent and refused to extend it to do so in this case. *Id.* It referred to *Perry v. Superior Court*, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (Ct. App. 1980) where the court of appeal considered a trial court decision using in loco parentis to award a stepparent visitation of his wife's daughter by a previous marriage. The court of appeal reversed, holding that the trial court could not award visitation to the husband unless the child was a child of the marriage. *Nancy S.*, 228 Cal. App. at 838, 279 Cal. Rptr. at 217 (citing *Perry*, 108 Cal. App. 3d at 484, 166 Cal. Rptr. at 586). The court of appeal invited the Legislature to resolve the problem as applied to stepparents and the Legislature did so by passing section 4351.5 of the California Civil Code in 1982. In *Nancy S.*, the court made the same invitation to the Legislature. As Part III, *infra*, explains, however, it is unlikely that the legislature will respond as quickly to this court's invitation as it did to the *Perry* court's.

<sup>256</sup> The court of appeal admitted that equitable estoppel has been used in California to impose support obligations on a husband who represented to his wife's children that he was their natural father and attempted to deny paternity to avoid support obligations. *Nancy S.*, 228 Cal. App. 3d at 839, 279 Cal. Rptr. at 217. But it noted that it has never been used in California against a natural parent to award custody and visitation to a "nonparent." *Id.* at 839, 279 Cal. Rptr. at 218 (citing *In re Marriage of Valle*, 53 Cal. App. 3d 837, 842, 126 Cal. Rptr. 38, 42 (1975)). However, the court did note that in *Valle*, 53 Cal. App. 3d at 842, 126 Cal. Rptr. at 42 (1975), the court acknowledged that "we perceive no good reason why the trial court should not have jurisdiction to award child custody when the parenthood is established by estoppel and when the issue is fairly and properly litigated with both parties present." The *Nancy S.* court distinguished that case by noting that neither party involved in that case was the natural parent of the children. But that factual distinction does not negate the logical implication that the *Valle* court expounded: to the extent that equitable estoppel can be used to impose support obligations, no principled reason exists for preventing its use to provide custody or visitation rights. See also, *Atkinson v. Atkinson*, 160 Mich. App. 601, 607, 408 N.W.2d 516, 520 (1987).

The *Nancy S.* court completed its discussion of equitable estoppel by distinguishing this case from that logical implication. It noted that "even if the doctrine of equitable estoppel could be used against a wife and in favor of a husband to award custody as if the dispute were between two natural parents, we note that the use of the doctrine of equitable estoppel, in these out-of-state cases, is rooted in "[one] of the strongest presumptions in law [i.e.] that a child born to a married woman is the legitimate child of her husband.'" 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218 (emphasis added)(citation omitted).

The court then noted that no similar presumption existed in this case, but did not explain why the existence of such a presumption was necessary for using the doctrine in cases such as *Nancy S.* The stepfather is no more a natural parent than any other nonlegal parent: he simply has a claim based on his marriage to the child's mother. Since gay men and lesbians cannot marry, they cannot make a similar claim. But they have a synonymous relationship with the child's parent and, if that relationship is sufficient to provide the stepfather with equitable rights, no justifiable distinction can be made for unmarried partners.

The California Court of Appeal would have been well-advised to have considered more carefully the decision of *Clevenger v. Clevenger*, 189 Cal. App.2d 658, 11 Cal. Rptr. 707 (Ct. App. 1961), which it cites to support its refusal to find that Nancy was equitably estopped from claiming that Michele was not the children's mother. In *Clevenger*, the 1st District Court of Appeal noted:

The relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted. We are dealing with the care and education of a child during his minority and with the obligation of a party who has assumed as a father to discharge it. *The law is not so insensitive as to countenance the breach of an*

tus—de facto parenthood, equitable parenthood, and functional parenthood—and rejected all three.

A de facto parent is one who “‘on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child’s physical needs and his psychological need for affection and care.’”<sup>257</sup> The court acknowledged that the facts established Michele was her children’s de facto parent but refused to provide her with rights to seek custody and visitation based on that status.<sup>258</sup> The court rejected her claim that, once having established her status as de facto parent, the court should consider the dispute as it would if two “parents” were involved.<sup>259</sup> Instead, it concluded that custody can be awarded to a de facto parent only upon evidence that parental custody is detrimental to the children.<sup>260</sup> The court based its decision on a presumption in favor of parental custody.<sup>261</sup> It is imposed when custody disputes occur between a parent and a stranger.<sup>262</sup> By refusing to provide any import to Michele’s status as a de facto parent, the court was able to use this presumption to deny her custody of her children.<sup>263</sup>

The court then turned to equitable parenthood, which it was careful to distinguish from equitable estoppel.<sup>264</sup> The court referred to the Michigan case of *Atkinson v. Atkinson*<sup>265</sup> to explain that equitable parenthood would allow a person “to obtain the status of a parent in a custody dispute with [a natural parent] and to have the dispute settled as if it were between two natural parents, according to the child’s best inter-

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*obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly sundered.*

189 Cal. App. 2d at 674, 11 Cal. Rptr. at 716(emphasis added). There, the court recognized that parenthood is too “sacred” to be easily discarded, even if that parenthood is not based on biological connection. In this case, the court should have recognized that Michele’s parental relationship with her children deserved equal concern and sanctity.

<sup>257</sup> *Nancy S.*, 228 Cal. App. 3d at 836, 279 Cal. Rptr. at 216 (quoting *In re B.G.*, 11 Cal. 3d 679, 690 n.18, 114 Cal. Rptr. 444, 453 n.18, 523 P.2d 244, 253 n.18 (1974)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 837 n.5, 279 Cal. Rptr. at 216 n.5. The court cited *In re Marriage of Halpern*, 133 Cal. App. 3d 297, 311-313, 184 Cal. Rptr. 740, 748 (1982) as its source for the parental presumption. This presumption does conflict, however, with established California law which indicates that all disputes over custody and visitation should be resolved based on the best interests of the child. Cal. Civ. Code § 4600 (West 1982).

<sup>262</sup> *In re B.G.*, 11 Cal. 3d at 693-694, 523 P.2d at 254, 114 Cal. Rptr. at 454.

<sup>263</sup> *Nancy S.*, 228 Cal. App. 3d at 836-37, 279 Cal. Rptr. at 216-17. Even though a de facto parent is necessarily not an “outsider,” the courts and the legislature have placed paramount importance upon the relationship between the natural or adoptive parent and the child.

<sup>264</sup> *Id.*

<sup>265</sup> *Atkinson v. Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987).

ests.<sup>266</sup> The court acknowledged that California had adopted the underlying doctrine of "equitable adoption" for inheritance purposes.<sup>267</sup> Nonetheless, it refused to adopt the concept of equitable parenthood for custody determinations, reasoning that because of "complex practical, social and constitutional ramifications. . . expanding the class of persons entitled to assert parental rights . . . was better left to the Legislature."<sup>268</sup>

This abdication of the court's responsibilities to the legislature was reiterated when the court considered whether to adopt a functional definition of parenthood. Under Polikoff's theory, functional parenthood would allow a class of persons to seek custody and visitation according to the same standards as a natural parent when that person has maintained a functional parental relationship with a child and when the relationship was created by a legally recognized parent who intended the relationship to be parental in nature.<sup>269</sup> The Court refused to adopt this theory, claiming that the legislature was the proper place to obtain this assistance.<sup>270</sup>

#### 4. Conclusion

As this discussion has shown, the New York, Wisconsin, and California courts all refused to interpret undefined terms in statutes or to apply the equitable doctrines available to them when faced with cases brought by nonlegal parents in alternative families. All three courts abdicated their responsibility to use the existing options for resolving this difficult societal problem facing the legal system. After rejecting the numerous alternatives available to them, they indicated that they were not responsible for the result that occurred in these cases. Instead, each pointed to the state legislature as the place where the expansion of the law to recognize nonlegal parents in alternative families should occur.

In *Nancy S.*, the California court presented the problem of the courts fashioning remedies in these situations.

We agree with appellant that the absence of any legal formalization of her relationship to the children has resulted in a tragic situation. As is always the case, it is the children who will suffer

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<sup>266</sup> *Nancy S.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 840, 279 Cal. Rptr. at 219 (citing *In re Marriage of Goetz & Lewis*, 203 Cal. App. 3d 514, 519-520, 250 Cal. Rptr. 30, 33 (1988)).

<sup>269</sup> *Id.* (citing Polikoff, *supra* note 7, at 464.)

<sup>270</sup> *Id.*

the most as a result of the inability of the adults, who they love and need, to reach an agreement. We do not, however, agree that the only way to avoid such an unfortunate situation is for the courts to adopt appellant's novel theory by which a nonparent can acquire the rights of a parent, and then face years of unraveling the complex practical, social, and constitutional ramifications of this expansion of the definition of a parent. . . . By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.<sup>271</sup>

The Wisconsin Supreme Court included much of this quote directly in its opinion.<sup>272</sup> It went on to note that "the legislature deliberately spared the legal system from an obligation to discern a just result from among the myriad of circumstances in which individuals could claim rights under the in loco parentis doctrine."<sup>273</sup> The New York Court of Appeals echoed this concern when it stated that it declined the invitation to define the term "parent" in the New York custody statute to include "categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child."<sup>274</sup> Citing the California decision, the court said that, while in individual cases it may be beneficial for a child to have a continuing relationship with a "nonparent," the legislature had not given that individual the opportunity to require a fit parent to allow such contact.<sup>275</sup>

These courts are correct in their assertion that having the legislature take the lead in resolving custody, visitation, and support issues for nonlegal parents in alternative families would be preferable to a case-by-case analysis.<sup>276</sup> But it is highly unlikely and extremely speculative if, and when, each state legislature would act to resolve this problem. Thus, pointing to them to solve the problem simply indicates a willingness on the part of the courts to abdicate their judicial responsibility.

When the state legislatures have enacted statutes recognizing the bonds between nonlegal parents and children in alternative families, they have provided the courts with the means to solve numerous

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<sup>271</sup> Id. (emphasis added).

<sup>272</sup> *Z.J.H.*, 162 Wis. 2d at 1018, 471 N.W.2d at 209.

<sup>273</sup> Id.

<sup>274</sup> *Alison D.*, 77 N.Y.2d at 657, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

<sup>275</sup> Id.

<sup>276</sup> *Family Resemblance*, supra note 2, at 1657.

problems. For example, section 109.119 of the Oregon Revised Statutes<sup>277</sup> allows individuals who have "established emotional ties creating a child-parent relationship" with a child to petition the court for custody or visitation.<sup>278</sup> The Oregon Supreme Court has not applied this statute to a case such as *Nancy S., Alison D.*, or *In the Matter of Z.J.H.*, but the legislature has given the court a statutory basis for recognizing and protecting the relationship between the nonlegal parent and the child(ren) of alternative families in dissolution cases.<sup>279</sup> While some have criticized the Oregon statute for being both overinclusive and

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<sup>277</sup> Or. Rev. Stat. Ann. § 109.119 (Butterworth 1990).

<sup>278</sup> The statute defines a child-parent relationship as:

a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.

Or. Rev. Stat. § 109.119(4). Polikoff notes that the Oregon Supreme Court has not definitively ruled whether the statute merely grants standing or has altered state substantive law. Polikoff, *supra* note 7, at 487. An amendment to a related section seems to imply that the change is substantive:

If the court determines that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child.

Or. Rev. Stat. § 109.119(1). Finally, another section of 109.119 allows an individual to file a visitation petition if he or she "has maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality" when the court decides "from clear and convincing evidence that visitation is in the best interests of the child and is otherwise appropriate in the case." Or. Rev. Stat. § 109.119(5).

The combination of these statutes seems to indicate an across-the-board effort by the Oregon legislature to address the problems of nonlegal parents of alternative families.

<sup>279</sup> The Oregon Supreme Court has noted that the statute's language

is at least in some respects wholly consistent with this court's previous decisions in child custody disputes between natural parents and others. In such disputes, it would never be proper to give custody to someone *other* than a natural parent unless custody in the other person best served the child's interests.

In re Marriage of Hruby & Hruby, 304 Or. 500, 516 n.9, 748 P.2d 57, 66 n.9 (1987)(emphasis in original). Given this footnote, it may be possible that the Oregon Supreme Court would follow the dictates of the California, New York, and Wisconsin courts by falling back on its prior custody cases, deny visitation to nonlegal parents of alternative families despite the opportunity the Oregon Legislature has provided to avoid such a result. It would be interesting to see what analytical course the Oregon court would have to take to reject an extension to alternative families given the explicit language of the Legislature.

underinclusive,<sup>280</sup> the legislature has done what no other state legislature has done<sup>281</sup>: recognized the need for the type of across-the-board

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<sup>280</sup> Polikoff points out the problems with the statute. She notes that the statute is overinclusive in not adequately protecting parental rights because it "does not require any showing of the biological parent's intent to create a parental relationship in the other person." Polikoff, *supra* note 7, at 488. Thus, it would be possible under the statute for a babysitter, boyfriend, girlfriend, or relative living in the parent's home to qualify. *Id.* Additionally, she notes the statute's underinclusiveness due to its six-month residency requirement. Thus, it may exclude individuals functioning as parents with the legal parent's consent but who, "because of financial hardship, emotional turmoil, a temporarily satisfactory custody and visitation arrangement, or some other reason" do not petition for visitation within six months of leaving the household. *Id.* at 488-489. While she believes that the residency requirement, which was added in the 1987 amendment of the statute, is an improvement because it eliminates "nonresident caretakers, neighbors, or nearby extended family members" from obtaining custody, it is not a close enough fit for establishing parenthood. *Id.* at 489. Instead she would encourage lawmakers to adopt her formulation for determining parenthood.

Courts or legislatures looking for guidance in developing a new definition of parenthood would best serve the interests of children by focusing on two criteria: the legally unrelated adult's performance of parenting functions and the child's view of that adult as a parent. Courts would also protect the interests of legal parents in parental autonomy by focusing on the actions and intent of those parents in creating additional parental relationships.

*Id.* at 490-491.

<sup>281</sup> The Minnesota Legislature has made a move in the direction taken by the Oregon Legislature but the language of its statutes is not as comprehensive as the Oregon legislative scheme. In Minn. Stat. § 257.022(2)(b) (West 1982), the Legislature provided for visitation rights when a minor has resided with an "other" person. The statute states:

If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority. The court shall grant the petition if it finds that:

- (1) visitation rights would be in the best interests of the child;
- (2) the petitioner and child had established emotional ties creating a parent and child relationship; and
- (3) visitation rights would not interfere with the relationship between the custodial parent and the child.

The scheme does seem to recognize that a "parent and child relationship" is possible between a child and another person. However, it is not as extensive a recognition as that provided by the Oregon Legislature which allows a court to recognize a child-parent relationship when granting custody, guardianship, visitation or other parental rights. On the contrary, the Minnesota statute only grants visitation rights to these nonbiological parents.

Additionally, the Minnesota court of appeal's decision interpreting the statute may cause some difficulty to members of alternative families attempting to use it to obtain visitation rights to the children of their families. In *In re the Matter of Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991), the court held that the petitioner seeking visitation rights must show prima facie evidence of all three factors *before* receiving an evidentiary hearing on the petition. *Id.* at 181. That case involved a dispute between two women who had lived together as lesbians over the child one of them bore with her prior husband with whom she later became reinvolved. The court noted that the court would need to find the existence of all three factors before granting the petition and therefore, to require prima facie evidence of each factor before holding an evidentiary hearing on the petition, would promote principles



statutory guidance that the California, New York and Wisconsin courts requested.

The problem with expecting state legislatures to take the lead in resolving this problem, however, is that nonlegal parents in alternative families do not present a strong enough political presence to obtain this legislative assistance, at least in the immediate future. Obtaining legislative assistance in changing the law is very difficult indeed. With the number of pressing issues before the state legislatures and the position that strong special interest groups play in shaping legislation, the expectation that these parents will be able to command the attention of enough state legislators and elicit their assistance is unrealistic, especially in light of the expected strong response that traditional family members may have against any changes in the custody and visitation rights. This article next turns to this problem of seeking legislative assistance in resolving the problems facing nonlegal parents in alternative families and establishes that, instead of abdicating their responsibility, the courts must fulfill their role of applying statutory interpretation or equitable theories to resolve these unique legal problems.

### III. THE PROBLEM OF TURNING TO STATE LEGISLATURES TO RESOLVE PROBLEMS OF NONLEGAL PARENTS IN ALTERNATIVE FAMILIES

Nonlegal parents are unlikely to achieve legislative assistance in the immediate future for resolving the parent-child disputes that arise during the dissolution of their alternative families. This is true because many of those who are most affected by the legal system's inability to resolve this problem are members of a "discrete and insular minority" which is politically unrepresented and, therefore, powerless to achieve

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of judicial economy. *Id.* The petitioner in that case raised the argument that placing the burden of proof on the petitioner to show that visitation rights would not interfere with the custodial parent's relationship with the child was improper. Allocating the burden in this manner would give the custodial parent(s) a virtual veto power over the matter by simply testifying that the parties were in conflict. The court rejected this argument by finding that, if the burden were difficult to meet, perhaps that was a proper allocation of the burden. *Id.* Additionally, the court found that in similar settings, such as grandparents seeking visitation or third parties seeking custody, the burden placed on the petitioner was similar. *Id.*

The court ended its discussion on this point by pointedly reminding petitioner that she would have *no* rights to visitation except for the statutory grant. It notes that she has no common law right to visitation. *Id.* One must wonder if the court had fully considered that conclusion before stating it and whether it had considered any of the equitable common law theories discussed above when making this blanket assertion.

legislative change.<sup>282</sup> Even assuming that enough gay men and lesbians could band together with unmarried heterosexuals and stepparents to seek legislative change, they are members of groups that have been recognized as politically powerless.<sup>283</sup>

The need for the courts to use their common-law or statutory interpretation powers to protect alternative families can be seen by reviewing some of the cases that have discussed the political "powerlessness" that gay men and lesbians have encountered in trying to obtain legislative protection. In previous cases alleging employment discrimination, the courts have discussed whether gay men and lesbians are entitled to quasi-suspect class status in equal protection cases.<sup>284</sup> In order to qualify for suspect or quasi-suspect status, they must establish that they (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority, politically powerless, or that the legislative classification burdens a fundamental right.<sup>285</sup> In considering the third factor, courts are reluctant to extend heightened protection to groups fully capable of securing their rights through the

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<sup>282</sup> See, *United States v. Carolene Products*, 304 U.S. 144, 152-153 n.4 (1938); *Watkins v. United States Army*, 847 F.2d 1329, 1348 (9th Cir. 1988) withdrawn en banc, 875 F.2d 699 (1989).

<sup>283</sup> This assertion that gay men and lesbians, in particular, are politically underrepresented and therefore politically powerless is not intended to discourage or dissuade activists from continuing to proceed with our legislative agendas. Lack of success on a nation-wide, state-wide, or local level does not mean that we should turn away from the struggle to challenge and change the system that does not resolve problems facing alternative families. While continuing to advocate struggles in the courts, the legislatures, and the streets, it is imperative that we recognize our limited legislative successes and continue to force the courts to wrestle with the issues that face us. The argument presented by this section should not be seen as an attempt to imply that there is a lack of a significant political agenda or a lack of dedication by gay and lesbian activists to achieve that agenda. Instead, this framework is presented simply to establish the need for the judicial system to accept its responsibility to provide protection when the means are available for it to do so, as is true with protecting the relationships between nonlegal parents and the children of alternative families.

<sup>284</sup> Recognition as a quasi-suspect class would entitle the plaintiffs to obtain strict scrutiny review of classifications that discriminate on the basis of sexual orientation. Strict scrutiny review is available in equal protection challenges if (1) the classification impinges on a fundamental right or (2) the classification impinges on a suspect or quasi-suspect class. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Either of these avenues is available for strictly scrutinizing a legislative classification to determine its constitutionality. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 378 (9th Cir. 1990)(Canby, J., dissenting from denial of rehearing, 895 F.2d 563 (1990)).

<sup>285</sup> *High Tech Gays*, 895 F.2d at 573 (9th Cir. 1990)(citing *Bowen v. Gilliard*, 483 U.S. 587, 602-603 (1986)). See also, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985); *Plyler v. Doe*, 457 U.S. 202, 228 (1982); *San Antonio School Indep. District v. Rodriguez*, 411 U.S. at 28.

legislative political process.<sup>286</sup> But, "because of the immediate and severe opprobrium often manifested against [gay men and lesbians] once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."<sup>287</sup>

The courts that have considered the question of granting quasi-suspect status to gay men and lesbians have disagreed about whether they are "sufficiently" politically powerless to meet the criteria for quasi-suspect status.<sup>288</sup> The clearest and most instructive disagreement comes between members of the Ninth Circuit in resolving the *High Tech Gays* security clearance suit.<sup>289</sup>

The Ninth Circuit panel determined that gay men and lesbians are not politically powerless because legislatures have recognized and addressed the discrimination suffered by gay men and lesbians by passing anti-discrimination statutes on the basis of sexual orientation. Due to this anti-discrimination legislation, the panel found that gay men and lesbians "are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."<sup>290</sup>

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<sup>286</sup> *Watkins*, 847 F.2d at 1348.

<sup>287</sup> *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985)(Brennan, J., dissenting from denial of cert.). See also *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 209 n.24 (N.D.Cal. 1983)("[Gay men and lesbians] attempting to form associations to represent their political and social beliefs, free from fatal reprisals for their sexual orientation" should be considered a discrete and insular minority.)

<sup>288</sup> While resolving this disagreement is not necessary for the purposes of this article, it is useful to review the debate as a means of estimating the likelihood of success in turning to the legislative, rather than the judicial, branch of government for assistance in protecting nonlegal parents in alternative families.

<sup>289</sup> In that case, the plaintiffs challenged the Department of Defense's policy of subjecting all gay men and lesbians who applied for secret and top secret clearances to expanded investigations, mandatory adjudications, and refusals to grant security clearance to known or suspected gay or lesbian applicants as violating the fifth amendment's due process clause and the first amendment's guarantee of free association. *High Tech Gays*, 895 F.2d at 565. The 9th Circuit reversed the District Court's conclusion that gay men and lesbians are a quasi-suspect class entitled to heightened scrutiny and that the Department of Defense's policy violated the constitution. *Id.* at 565. The 9th Circuit panel disagreed whether gay men and lesbians are politically powerless. See *Id.* at 574.

<sup>290</sup> *High Tech Gays*, 895 F.2d at 574. The legislation that the panel recognized was Wisconsin's comprehensive statute barring employment discrimination on the basis of sexual orientation, Wis. Stat. Ann. §§ 111.31-111.395 (West 1988); the California statute prohibiting violence against person or property based on sexual orientation, Cal. Civ. Code § 51.7 (West 1984); the Michigan statute barring denial of care in health facilities on the basis of sexual orientation, Mich. Comp. Laws. Ann. § 333.20201(2)(a)(West 1984); and the New York Executive Order prohibiting discrimination in state employment and in provision of state services on the basis of sexual orientation. N.Y. Comp. Codes R. & Regs. Tit. 4, § 28 (1983). The panel also noted the numerous cities and counties that have banned discrimination on the basis of sexual orientation. The panel notes ordinances in New York, Los Angeles,

The dissent of the en banc denial of rehearing noted the paucity of legislation that the panel used to support its position. It compared the amount of legislation that protects racial minorities with the amount of legislation protecting gay men and lesbians and found it incongruous that racial minorities would be found to qualify for suspect class status based on political powerlessness when gay men and lesbian cannot.

[The panel's] support for this proposition [of lack of political powerlessness] . . . is clearly insufficient to deprive homosexuals of the status of a suspect classification. Compare the situation with that of blacks, who clearly constitute a suspect category for equal protection purposes. Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts, . . . as well as by antidiscrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless. . . . Certainly homosexuals as a class wield less political power than blacks, a suspect classification, or women, a quasi-suspect one.<sup>291</sup>

Additional support for the dissent's conclusion that gay men and lesbians are politically powerless comes from the fact that gay and lesbian political groups have been powerless to convince Congress to pass a federal anti-discrimination statute. Since 1975, the Federal Gay Civil Rights Bill has been introduced in every congressional session and has never been passed.<sup>292</sup> Although Congress passed two statutes in 1990 that do give some protection to lesbians and gay men,<sup>293</sup> neither of

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Chicago, Washington D.C., Atlanta, Boston, Philadelphia, Seattle, and San Francisco. *High Tech Gays*, 895 F.2d at 574 (citing Developments in the Law, Sexual Orientation and the Law, 102 Harv. L. Rev 1554, 1667-1668 nn. 49-51 (1989)).

<sup>291</sup> *High Tech Gays*, 909 F.2d at 377-378.

<sup>292</sup> Sex, Lies and Civil Rights, *supra* note 20, at 556. The bill would add "sexual orientation" to the protected classes listed in the Civil Rights Act of 1964 and the Fair Housing Act. *Id.*

<sup>293</sup> The Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (1990) directs the United States Department of Justice to collect and publish statistics on crimes showing evidence of prejudice based on race, religion, ethnicity, and sexual orientation. Sex, Lies and Civil Rights, *supra* note 20, at 554. While this is a step in the right direction, all the statute does is authorize the collection and publication of data. No new crimes have been added to the federal statutes and no causes of action created to protect victims of hate crimes. *Id.* More importantly, Congress was so distressed by including sexual orientation in the bill that it felt it necessary to add disclaimers stating that it reaffirmed the value of the American family (presumably excluding alternative families) and did not endorse homosexuality. *Id.* Additionally, Congress passed the Americans with Disabilities Act of 1990 which was intended to increase access for, and decrease discrimination against, people with disabilities in various areas. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1990). The ADA does cover people infected with, or perceived to be infected with, Human Immunodeficiency Virus (HIV), the virus connected with Acquired Immune Deficiency Syndrome (AIDS). Sex, Lies and Civil Rights, *supra* note 20, at 555. Because gay men make up most of those believed to be infected with HIV or AIDS, opponents of the bill were concerned that the statute could be used to provide

them provided protection against discrimination and both of them were specifically limited to prevent any belief that Congress was comfortable passing legislation to assist gay men and lesbians.<sup>294</sup> Additionally, only limited success has resulted from attempts to pass comprehensive anti-discrimination statutes, such as Wisconsin's, in other states.

[Fifteen] states<sup>295</sup> and eighty-seven cities and counties prohibit discrimination in public employment on the basis of sexual orientation. As for more traditional civil rights statutes, covering private employment and housing, gay and lesbian people enjoy protection in more than forty-five cities and counties. Although only three states, Massachusetts, Wisconsin and Hawaii,<sup>296</sup> have approved traditional civil rights statutes covering sexual orientation, similar legislation has been introduced in nine other state legislatures.<sup>297</sup> In four additional states, more limited legislation which would protect gay and lesbian people from discrimination in employment is pending.<sup>298</sup>

Additional victories in protecting gay men and lesbians have occurred in the locales that allow same-sex couples to establish recognized domestic partnerships or alternative families.<sup>299</sup> But all of these victories are limited. Not only are they confined to limited geographic areas and provide limited protection, they are subject to voter repeal efforts.<sup>300</sup> Significantly for this article, political powerlessness can also be seen by the fact that none of the fifty states allow gay men or lesbians to marry.

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general civil rights for gay men and lesbians. Therefore, they included specific limitations stating that homosexuality and bisexuality, among others, are explicitly excluded from coverage under the statute. *Id.* Thus, although the ADA would protect those perceived to have a disability, it could not be used to protect gay men or lesbians whose rights were violated by others who perceive homosexuality to be a sickness. *Id.* at 555 n.37.

<sup>294</sup> *Id.* at 554-556.

<sup>295</sup> Ten states achieved this through executive order: California, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Colorado; three other states through legislation: Maryland, Massachusetts, and Wisconsin; and two states through civil service rule interpretation: Illinois and Michigan. *Sex, Lies, and Civil Rights*, supra note 20, at 557 n.40.

<sup>296</sup> Connecticut also passed a bill prohibiting discrimination on the basis of sexual orientation on April 18, 1991. 1991 Conn. Acts 91-58 (Jan. Reg. Sess.).

<sup>297</sup> As of Feb. 1, 1991, bills were pending in the following states: Florida, Illinois, Iowa, Maine, New York, South Dakota, Vermont, Washington, and Pennsylvania. *Sex, Lies, and Civil Rights*, supra note 20, at 557 n.43.

<sup>298</sup> Those states are California, Maryland, New Jersey, and New York. *Id.* at 557 n.44. The California legislation, which was passed by the legislature, was vetoed by Governor Wilson. T. Wood, *Gay Activists Are Surprised By Veto*, Los Angeles Times, Sept. 30, 1991, at A19 col. 1.

<sup>299</sup> *Sex, Lies, and Civil Rights*, supra note 20, at 557. For a list of those locales, see supra note 5.

<sup>300</sup> *Id.* at 557-558.

It seems apparent that gay men and lesbians are politically powerless as a group in appealing to state legislatures to pass legislation protecting them from discrimination and protecting their family arrangements. Their attempts to achieve assistance from the legislative, judicial, and executive branches of state and federal government have resulted in minimal help. While some success has been enjoyed, it tends to be specific legislation that does not address across-the-board concerns of these individuals. Given this political powerlessness, the courts must take responsibility to use the means available to them to protect the nonlegal parents in alternative families.

Among the solutions offered instead of case-by-case judicial resolution of these problems is for gay men and lesbians to obtain state-wide recognition of their families through either marriage,<sup>301</sup> domestic partnership legislation,<sup>302</sup> or other legislation that would change the definition of family.<sup>303</sup> Marriage would solve some of the problems of child custody and visitation for those gay and lesbian couples who choose to marry, just as it solves some of these problems for those heterosexual couples who choose to marry. Married couples receive the law's protection for a continued relationship with their children even when the marriage dissolves. If marriage were an option, it would be easier to accept the argument that couples who choose not to marry have made their choice and cannot complain that the legal system will not protect them outside of the preferred method of recognition. Additionally, if domestic partnership legislation were passed on a state-wide basis recognizing alternative families, that option would also solve these problems.<sup>304</sup>

But marriage should not be seen as an option that will resolve all legal problems of alternative families facing parenthood issues for three reasons. First, marriage does not solve all these problems currently. While stepparents have received more legal recognition and protection than other members of alternative families, that recognition and protection has been sporadic. Stepparents are not fully recognized as parents by the legal system and these limitations would face cur-

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<sup>301</sup> See Note, *Family, Marriage, and the Same-Sex Couple*, 12 *Cardozo L. Rev.* 681 (1990); Schwarzschild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 *Berk. Women's L.J.* 94 (1988-89); Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 *Berk. Women's L.J.* 134 (1987-88).

<sup>302</sup> *Family Resemblance*, *supra* note 2, at 1658-1659.

<sup>303</sup> Colker, *supra* note 17, at 326. Colker does not oppose the passage of statutes opening up marriage to gay men and lesbians but does not believe that the gay and lesbian community should place it at the top of its political agenda.

<sup>304</sup> *Family Resemblance*, *supra* note 2, at 1657-1659.

rently unmarried heterosexual, gay, or lesbian couples who chose to marry if it were an option.

Second, many heterosexual and homosexual couples do not believe that marriage is the best option for them for their personal lifestyle or beliefs. For example, an ongoing debate exists in the gay and lesbian community whether the next political action should be an attempt to attain marriage rights in the various states. Part of the debate centers on whether broadening the individuals eligible for marriage is a political step that should be taken.<sup>305</sup>

Third, gay men and lesbians are no more likely to obtain legislation permitting them to marry than to obtain legislation recognizing their parental bonds formed within alternative families. Currently, gay men and lesbians do not have any option for protecting their relationships with their children. All fifty states deny them the right to marry.<sup>306</sup> No state has adopted a state-wide domestic partnership legislation.<sup>307</sup> No state has explicitly granted them recognition or protection for their relationships with the children in their alternative families that has been afforded to biological or legal parents. They are politically powerless to turn to the legislatures to achieve changes either in the marriage laws

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<sup>305</sup> Opponents of same-sex marriage as a high priority argue that marriage is a sexist, patriarchal institution that lesbian and gay people should not be seeking to enter. Entering that institution would simply contribute to our subordination at the hands of the state. Moreover, opponents argue that there is no reason to assume that same-sex relationships would actually gain social legitimacy by receiving this token state sanction. Instead, lesbian and gay people would sacrifice some of their anonymity, making them even easier targets for discrimination. Finally, some opponents argue that if marriage is available, lesbian and gay people would be under strong pressure to marry, because benefits would be available only on that basis. Thus, they argue that we should fight for recognition of a broader definition of family but not tie that recognition to the institution of marriage.

Advocates of lesbian and gay marriage as a high priority argue that as long as lesbian and gay people are denied this privilege, they are denied full citizenship. While they recognize the possible problems with embracing marriage, because of its patriarchal history, they also suggest that allowing lesbian and gay people to enter marriage would transform the institution. Marriage could become an institution of intimacy between equals if same-sex couples could marry. Thus, attaining marriage for lesbian and gay people should be a priority, because that step would make marriage-dependent benefits available to lesbian and gay people while radicalizing the institution of marriage.

Colker, *supra* note 17, at 321-322 (footnotes omitted).

<sup>306</sup> *Id.* at 321 n.2. Denmark does allow some of the privileges of marriage to gay men and lesbians, although they remain forbidden from adopting children. *Id.*

<sup>307</sup> Because marriage and parenthood issues are based on state law, the cities who have provided protection to domestic partners or alternative families do not have jurisdiction to provide them with protection or recognition of the parental bonds within their families. *Id.*

or the custody and visitation statutes or to obtain state-wide domestic partnership legislation.

As this article has shown, they have also been rejected by the courts. Because they are outside the constitutionally protected "unitary" family, because they are outside the statutorily protected "marital" family, because they are outside the legal system's ability to recognize their alternative families, nonlegal parents in alternative families have been afforded no relief for a problem that is traumatic for both parent and child alike. It is not good enough for the courts to throw up their hands in anguish, note the tragic circumstances that are occurring, and claim inability to prevent these tragedies. Polikoff, Bartlett, the Oregon legislature, the Michigan courts, and numerous other courts have presented possible solutions to the problems that face nonlegal parents in alternative families. The courts' continued refusal to remedy this problem for alternative families evinces an abdication of their responsibility to those turning to them for assistance.

This abdication is particularly dangerous for members of oppressed minorities, such as gay men and lesbians.

At a time when civil rights plaintiffs are being advised, often by sympathizers, to abandon the federal courts for other fora, it may be important to recognize that the most dangerous subversive effect of a judiciary that has abdicated its responsibility to protect minorities from oppression would be the acceptance of the idea that civil rights are a function of majoritarian determination.<sup>308</sup>

Those courts who encourage plaintiffs to seek other fora, most particularly the state legislatures, to obtain protection of the relationships between nonlegal parents and children in alternative families have abdicated their responsibility to protect these minorities from majoritarian oppression. Their duty, in this pluralistic community, is to recognize the inability of the legislature to grapple with certain problems and to provide protection to those members of politically powerless minority groups who turn to them for assistance. When clear remedies are available through statutory interpretation or within currently viable equitable doctrines that can provide this protection, it is all the more appalling that the courts are willing to turn their backs and walk away. As many gay and lesbian activists would shout: "Shame, shame."

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<sup>308</sup> Sex, Lies and Civil Rights, *supra* note 20, at 630-631.



